Supreme Court, U.S.
FILED
JAN 9 - 2009
OFFICE OF THE CLERK

No. 08 884

IN THE

Supreme Court of the United States

LAWRENCE S. BERGER; REALTY RESEARCH CORPORATION, PETITIONERS

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF THE TREASURY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DENNIS CALO
Counsel of Record

FRANK AGOSTINO
JAMES J. BONICOS

Calo Agostino, P.C.
The Bank House
14 Washington Place
Hackensack, NJ 07601
(201) 488-5400

Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

This petition stems from the Internal Revenue Service's refusal to release, pursuant to the Freedom of Information Act ("FOIA") and Privacy Act, the work-related time records of one of its employees who was in charge of a civil tax investigation of Petitioners. Petitioners sought such records to the extent that they memorialized the time spent and activities performed by the employee with respect to the investigation. In the opinion for which review is sought, the Third Circuit held that the employee had a privacy interest which would be threatened by the release of the records which justified their withholding under "Exemption 6" of the FOIA which protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). In reaching this holding, the Third Circuit did not review the District Court's opinion de novo, as is the practice in several other circuits. The Third Circuit held that the records did not have to be released under the Privacy Act because, in its opinion, the records did not pertain to Petitioners, but rather to the employee who created them and therefore were outside the scope of the statute.

The questions presented are:

I. Given the split of authority among the circuits, what standard of review should be used to evaluate an appeal from a grant of summary judgment in a FOIA case?

II. For purposes of applying Exemption 6 of the FOIA, does a federal employee have a privacy

interest which would be threatened by the release of the employee's work-related time records, notwithstanding the fact that the records relate solely to the employee's official duties as an employee of the Government?

III. Are the work-related time records of a federal employee, which memorialize the time spent and activities performed by the employee with respect to an agency investigation, sufficiently related to the individual who was the target of the investigation so as to permit the individual to inspect the records under the Privacy Act?

RULE 29.6

Petitioner Realty Research Corp. is a privately held company. There is no publicly held corporation that owns more than 10% of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 37

APPENDIX

Circuit Court Opinion 1a
Opinion and Order of the District Court 11a
Order Denying Rehearing 53a

TABLE OF AUTHORITIES

Page

CASES

ABDELFATTAH V. U.S. DEPT. OF HOMELAND SEC., 488 F.3D 178, 182(3D 15
ASSASSINATION ARCHIVES & RESEARCH CTR. V. CIA, 334 F.3D 55, 57 (D.C. CIR. 2003) 6
ASSOCIATED GEN. CONTRACTORS, INC. V. EPA, 488 F. SUPP. 861, 863 (D. NEV. 1980) 25
BIBLES V. OREGON NATURAL DESERT ASS'N, 519 U.S. 355, 355-56 (1997) 29
BLAZY V. TENET, 979 F. SUPP. 10, 16 (D.D.C. 1997) 14
CAMPAIGN FOR RESPONSIBLE TRANSPLANTATION V. FOOD & DRUG ADMIN., 511 F.3D 187, 190 (D.C.CIR., 2007) 4
CASAD V. HHS, 301 F.3D 1247, 1251 (10TH CIR. 2002) 6
COLUMBIA PACKING CO., INC. V. U.S. DEPT. OF AGRICULTURE, 563 F.2D 495, 499 (1ST CIR. 1977) 29
COOPER CAMERON CORP. V. U.S. DEP'T OF LABOR, 280 F.3D 539, 543 (5TH CIR. 2002) 15, 29
COOPER INDUSTRIES, INC. V. LEATHERMAN TOOL GROUP, INC., 532 U.S. 424 (2001) 8
COOTER & GELL V. HARTMARX CORP., 496 U.S. 384, 400 (1990) 7, 16
CORE V. UNITED STATES POSTAL SERV., 730 F.2D 946, 948 (4TH CIR. 1984) 25
CUCCARO V. SECRETARY OF LABOR, 770 F.2D 355, 360 (3D CIR. 1985) 33, 34
DEPARTMENT OF AIR FORCE V. ROSE, 425 U.S. 352, 375, N. 14 (1976) 21
DEPARTMENT OF JUSTICE V. REPORTERS COMM. FOR FREEDOM OF PRESS, 489 U.S. 749 (1989) 13, 20, 21
DEPT. OF STATE V. WASHINGTON POST CO., 456 U.S. 595, 602 (1982) 9, 10, 20, 21
DICKINSON V. ZURKO, 527 U.S. 150, 154 (1999) 8
ENVIRO TECH INT'L, INC. V. EPA, 371 F.3D 370, 373-74 (7TH CIR. 2004) 6, 7

ETHYL CORP. v. EPA, 25 F.3D 1241, 1246 (4TH CIR. 1994) 6, 10
FLIGHTSAFETY SERVS. CORP. v. DEP'T OF LABOR, 326 F.3D 607, 610-11 & N.2 (5TH CIR. 2003) (PER CURIAM) 6
GASPERINI v. CENTER FOR HUMANITIES, INC., 518 U.S. 415, 421 (1996) 16
GETMAN v. N.L.R.B., 450 F.2D 670, 674 (D.C. CIR. 1971) 23
HALLORAN v. VETERANS ADMIN., 874 F.2D 315, 320 (5TH CIR. 1989) 10
HALPERN v. FBI, 181 F.3D 279, 287 (2D CIR. 1999) 6, 12, 17
HENKE v. UNITED STATES DEPARTMENT OF COMMERCE, 1996 WL 692020 AT *4 (D.D.C. 1994), AFF'D ON OTHER GROUNDS, 83 F.3D 1445 (D.C. CIR. 1996) 35
IN RE COLUMBIA/HCA HEALTHCARE CORP. BILLING PRACTICES LITIGATION, 293 F.3D 289, 311 (6TH CIR. 2002) 30
INTERNATIONAL BHD. OF ELEC. WORKERS LOCAL UNION NO. 5 v. UNITED STATES DEP'T OF HOUS. AND URBAN DEV., 852 F.2D 87, 89 (3D CIR.1988) 24
JONES v. F.B.I., 41 F.3D 238, 242 (6TH CIR. 1994) 12
KOON v. UNITED STATES, 518 U.S. 81 (1996) 16
LAME v. U.S. DEPT. OF JUSTICE, 767 F.2D 66 (3D CIR. 1985) 11
MARICOPA AUDUBON SOC. v. U.S. FOREST SERVICE, 108 F.3D 1082 (9TH CIR. 1997) 7
MCDONNELL v. UNITED STATES, 4 F.3D 1227, 1242 (3D CIR. 1993) 11
MILLER v. FENTON, 474 U.S. 104, 114 (1985) 16
MISSOURI v. U.S. DEP'T OF THE INTERIOR, 297 F.3D 745, 749 N.2 (8TH CIR. 2002) 6
MURPHY v. FEDERAL INS. CO., 206 FED.APPX. 143, 148 (3D CIR. 2006) 8
NATIONAL ARCHIVES AND RECORDS ADMIN. v. FAVISH, 541 U.S. 157, 171 (2004) 18, 19
NATIONAL ASSN. OF RETIRED FEDERAL

EMPLOYEES v. HORNER, 879 F.2D 873 (D.C. CIR. 1989) 27, 28
NAT'L W. LIFE INS. v. UNITED STATES, 512 F. SUPP. 454, 461 (N.D. TEX. 1980) 25
NEWS-PRESS v. U.S. DEPT. OF HOMELAND SEC., 489 F.3D 1173, 1189 (11TH CIR. 2007) 6, 10
NIXON v. ADMINISTRATOR OF GENERAL SERVICES, 433 U.S. 425 (1977) 22
NLRB v. ROBBINS TIRE & RUBBER CO., 437 U.S. 214, 242 (1978) 18
PACIFIC FISHERIES, INC. v. U.S., 539 F.3D 1143, 1149 (9TH CIR. 2008) 6
PANSY v. BOROUGH OF STROUDSBURG, 23 F.3D 772, 787 (3D CIR. 1994) 24
PATTERSON v. FED. BUREAU OF INVESTIGATION, 893 F.2D 595, 602 (3D CIR. 1990) 14
PETROLEUM INFO. CORP. v. UNITED STATES DEP'T OF INTERIOR, 976 F.2D 1429, 1433 (D.C.CIR.1992) 12
PIERCE v. UNDERWOOD, 487 U.S. 552, 558 (1988) 12, 16
QUINN v. STONE, 978 F.2D 126, 133 (3D. CIR. 1992) 32
RAYTHEON AIRCRAFT CO. v. U.S. ARMY CORPS OF ENG'RS, 183 F. SUPP. 2D 1280, 1283 (D. KAN. 2001) 16
RUGIERO v. U.S. DEP'T OF JUSTICE, 257 F.3D 534, 543 (6TH CIR. 2001), CERT. DENIED, 534 U.S. 1134 (2002) 6
SCHIFFER v. F.B.I., 78 F.3D 1405 (9TH CIR. 1996) 10
SHEET METAL WORKERS INT'L ASS'N v. VA, 135 F.3D 891, 896 & N.3 (3D CIR. 1998) 6, 7, 11
STERN v. FBI, 737 F.2D 84, 92 (D.C.CIR.1984) 30
SULLIVAN v. VETERAN'S ADMINISTRATION, 617 F.SUPP. 258 (D.D.C. 1985) 24
TOPURIDZE v. USIA, 772 F. SUPP. 662, 665 (D.D.C. 1991) 35
U.S. DEPT. OF DEFENSE v. FEDERAL LABOR RELATIONS AUTHORITY, 510 U.S. 487, 497 (1994) .. 19, 21, 29
U.S. DEPT. OF STATE v. RAY, 502 U.S. 164, 167-170 (1991) 20, 23, 26, 27
VOELKER v. IRS, 646 F.2D 332, 334 (8TH CIR. 1981) 35

WARD V. MERCK & CO., INC., 226 FED.APPX. 131, 140 (3D CIR. 2007) 5
WHALEN V. ROE, 429 U.S. 589, 598-600, 97 S.CT. 869, 875-877, 51 L.ED.2D 64 (1977) 20, 21
WILLIAMS V. DEPARTMENT OF VETERANS AFFAIRS, 104 F.3D 670 (4TH CIR. 1997) 32

STATUTES

5 U.S.C. § 552a(a)(2) 31
5 U.S.C. § 552(a)(4)(B) 1, 16
5 U.S.C. § 552a(a)(5) 33
5 U.S.C. § 552(b) 19
5 U.S.C. § 552a(b)(2) 35
5 U.S.C. § 552(b)(6) 2, 13, 23
5 U.S.C. § 552(b)(7)(C) 13, 23
5 U.S.C. § 552a(d) 2, 32
5 U.S.C. § 552a(k) 36
5 U.S.C. § 552a(k)(2) 36
5 U.S.C. § 552a(k)(5) 35
26 U.S.C.§ 6103 4
28 U.S.C.§ 1254(1) 1

REGULATIONS

31 C.F.R. § 1.36(g)(viii) 36
5 C.F.R. §293.311 25

RULES

Fed.R.Civ.P. 52(a)(6) 11
Fed.R.Civ.P. 56(c) 11, 12

OTHER AUTHORITIES

Paul R. Verkuil, An Outcomes Analysis of Scope of Review Standards, 44 Wm & Mary L Rev 679, 713 (2002) 18

OPINIONS BELOW

The Third Circuit opinion is reported at 2008 WL 3286782 (3d Cir., 2008). (1a-10a)[1] The District Court opinion is reported at 487 F.Supp.2d 482 (D.N.J., 2007). (11a-52a).

JURISDICTION

The Third Circuit opinion was rendered on August 11, 2008. A timely petition for rehearing, with suggestion for rehearing en banc, was denied on October 14, 2008. (53a). This court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B):

> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this

---

[1]References to the Appendix appear as "__a".

section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

Freedom of Information Act, 5 U.S.C. § 552(b)(6) ("Exemption 6"):

(b) This section does not apply to matters that are—

* * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

Privacy Act, 5 U.S.C. § 552a(d):

(d) **Access to Records.**— Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

STATEMENT

The issue at the core of this case is the extent to which a federal agency may refuse to release, under the FOIA and Privacy Act, the time records of one of its employees who was in charge of the agency's investigation of the party requesting the records. A secondary, but no less important, issue is the proper standard of review applicable to appeals from summary judgment in FOIA cases.

Petitioners, Lawrence S. Berger and Realty Research Corporation, were the subject of a criminal investigation and civil Trust Fund Recovery Penalty ("TFRP") investigation by the Internal Revenue Service ("IRS").[2] The TFRP investigation was conducted by IRS Revenue Officer Mary N. Williams ("Revenue Officer Williams"). No charges were ever brought against Petitioners as a result of these investigations. By letter dated, December 8, 2003, Petitioners requested records from the IRS pursuant to the FOIA, the Privacy Act and several sections of the Internal Revenue Code which are not relevant to this petition ("the FOIA/PA Request"). Among the

[2] The District Court described the TFRP as follows: "The Internal Revenue Code . . . requires employers to withhold from their employees' paychecks funds representing the employees' personal income and Social Security taxes. Because employers must hold these funds in 'trust' for the United States, the taxes are commonly referred to as 'trust fund' taxes. Should employers fail to turn over the trust fund taxes, the IRS may collect a Trust Fund Recovery Penalty, equal to the sum of the unpaid taxes, directly from the officers or other persons within the company who are responsible for collecting the taxes." (48a)(citation omitted).

documents requested, were Revenue Officer Williams' time records which related to the TFRP investigation of Petitioners. Over the course of the following months, the IRS released various documents in response to the FOIA/PA Request. Revenue Officer Williams' time records however, were not released.

When the IRS continued to withhold the time records and other documents which were within the scope of the FOIA/PA Request, the Petitioners commenced the underlying lawsuit in the District Court on August 3, 2005 to compel the IRS to release the records. While the lawsuit was pending, the IRS produced a "Vaughn Index" describing the records it was withholding.[3] According to the Vaughn Index, 711 pages of Revenue Officer Williams' time records were within the scope of the FOIA/PA Request and were being withheld from Petitioners in their entirety pursuant to FOIA Exemption 6 and FOIA Exemption 3 in conjunction with 26 U.S.C. §6103.

On October 27, 2006, the IRS moved for summary judgment with respect to the records it was withholding. No declaration or other sworn testimony from Revenue Officer Williams was submitted by the IRS in support of the motion which instead relied upon declarations from other IRS personnel. (3a). By

---

[3] A Vaughn Index "is created by an agency to assist courts and FOIA requesters when the agency claims that responsive documents are exempt from disclosure. The index is supposed to describe with reasonable specificity the material withheld and justify why each responsive document is exempt from disclosure under FOIA." *Campaign for Responsible Transplantation v. Food & Drug Admin.*, 511 F.3d 187, 190 (D.C.Cir., 2007)(internal quotation and citation omitted).

opinion dated, May 22, 2007, the District Court granted the motion in its entirety. (11a-52a). The motion was decided entirely on the papers submitted by the parties, with no hearing, oral argument or in camera review of the withheld documents having been conducted by the District Court. Petitioners filed a notice of appeal on June 15, 2007. On appeal, Petitioners contended, inter alia, that the District Court erred in holding that Revenue Officer Williams' time records were protected from disclosure under FOIA Exemption 6 and the Privacy Act. Petitioners also argued that the Third Circuit should review the District Court's decision under a plenary standard, which is the equivalent of de novo review under the law of the Circuit. *Ward v. Merck & Co., Inc.*, 226 Fed.Appx. 131, 140 (3d Cir. 2007).

On August 11, 2008, the Third Circuit issued the opinion for which review is sought. (1a-10a). A timely petition for rehearing, with suggestion for rehearing en banc, was denied on October 14, 2008. (53a). This petition followed.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING THE STANDARD OF REVIEW APPLICABLE TO FOIA APPEALS.

The Third Circuit did not review the District Court's opinion de novo but instead used a deferential two-tier approach which required it to first determine whether the District Court had an adequate factual basis for its decision and, if so, whether that decision

was clearly erroneous. (4a). Petitioners respectfully contend that this was in error and that certiorari should be granted to resolve a conflict among the circuits on this issue.

A. The circuit conflict:

There is a clear split among the circuits regarding the proper standard of review applicable to FOIA appeals. The District of Columbia, Second, Sixth and Eighth circuits use a de novo standard. See *e.g.*, *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003); *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 543 (6th Cir. 2001), cert. denied, 534 U.S. 1134 (2002); *Missouri v. U.S. Dep't of the Interior*, 297 F.3d 745, 749 n.2 (8th Cir. 2002). The Third, Fifth and Seventh circuits, while recognizing that issues of law generally are viewed de novo, use the two-tier standard described above. See e.g., *Sheet Metal Workers Int'l Ass'n v. VA*, 135 F.3d 891, 896 & n.3 (3d Cir. 1998); *FlightSafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607, 610-11 & n.2 (5th Cir. 2003) (per curiam); *Enviro Tech Int'l, Inc. v. EPA*, 371 F.3d 370, 373-74 (7th Cir. 2004). A hybrid approach is used by the Fourth, Ninth, Tenth and Eleventh circuits which review a district court's factual basis for its decision under a clearly erroneous standard but which most often review a district court's application of FOIA exemptions to withhold documents under a de novo standard. See *e.g.*, *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1246 (4th Cir. 1994); *Pacific Fisheries, Inc. v. U.S.*, 539 F.3d 1143, 1149 (9th Cir. 2008); *Casad v. HHS*, 301 F.3d 1247, 1251 (10th Cir. 2002); *News-Press v. U.S. Dept. of Homeland Sec.*, 489 F.3d 1173, 1189 (11th Cir. 2007).

This conflict has been explicitly noted in several circuit court opinions. See *e.g.*, *Enviro Tech Intern., Inc. v. U.S. E.P.A.*, 371 F.3d 370, 373 (7th Cir. 2004)("We have also recognized that the courts of appeals are divided as to the appropriate standard of review in FOIA cases decided by way of summary judgment. Indeed, our own case law is not entirely consistent on this point."); *Maricopa Audubon Soc. v. U.S. Forest Service*, 108 F.3d 1082 (9th Cir. 1997)("Our standard of review in FOIA cases is unclear."); *Sheet Metal Workers Intern. Ass'n, Local Union No. 19 v. U.S. Dept. of Veterans Affairs*, 135 F.3d 891, FN 1 (3d. Cir. 1998)("This standard does not receive uniform application among the courts of appeals."). The Department of Justice has also noted the conflict, stating that "the case law on this point simply cannot be reconciled among the various circuits, and conflicting decisions are not uncommon even within the same circuit." *DOJ, Freedom of Information Act Guide, March 2007* at pg. 1060.[4]

The circuit disagreement over the proper appellate standard of review is significant because the "clearly erroneous" standard at the heart of the two-tier approach used by the Third Circuit is far more deferential than a de novo standard since it prevents an appellate court from overturning a district court's decision in situations where the appellate court would otherwise do so based upon the same evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990)("In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court

---

[4]This guide is available on the Department of Justice's website at: http://www.usdoj.gov/oip/foia_guide07.htm.

determination that falls within a broad range of permissible conclusions."). The Third Circuit noted this limitation in the opinion for which review is sought, stating that it would only reverse the District Court's decision "if the findings are unsupported by substantial evidence, lack adequate evidentiary support in the record, are against the clear weight of the evidence or where the district court has misapprehended the weight of the evidence." (4a) (citations and internal quotations omitted).

This Court has recognized "the importance of maintaining a uniform approach to judicial review of administrative action..." *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999). This interest is obviously threatened by the application of differing standards of review by the circuits because the standard chosen can often be dispositive to an appeal, a fact which has been recognized by both this court and the Third Circuit. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)("it does seem likely that in this case a thorough, independent [de novo] review of the District Court's rejection of petitioner's due process objections to the punitive damages award might well have led the Court of Appeals to reach a different result."); *Murphy v. Federal Ins. Co.*, 206 Fed.Appx. 143, 148 (3d Cir. 2006)("In some cases the standard of review may be critical, as a court of appeals might affirm an order exercising deferential review that it might reverse on a plenary review."). This risk of divergent decisions caused by the use of different standards of review is heightened with respect to

FOIA cases due to the great volume of such actions which are filed each year.[5]

Given the split of authority among the circuits as to the proper standard of appellate review and the resulting divergence in decisions which may result therefrom, Petitioners respectfully request that certiorari be granted to resolve the conflict.

B. The Third Circuit applied the two-tier standard of review differently than other circuits:

The disagreement among the circuits regarding the proper standard of review is also shown by the manner in which the Third Circuit applied the two-tier standard in this case, which differed from the way other circuits have applied the same standard.

The question confronting the Third Circuit was whether the District Court properly concluded that Exemption 6 protected Revenue Officer Williams' time records from disclosure. A two-part test is used to determine whether Exemption 6 protects a document from disclosure. First, a court must decide whether the withheld information is contained in a file which is subject to the exemption. *Dept. of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). If so, the second part of the test requires the court to balance the public interest in disclosure against the private interest in

---

[5]The Department of Justice compiles an annual list of FOIA cases which indicates that over 375 such cases were decided in the federal courts in 2007 alone. See list at: http://www.usdoj.gov/oip/07decisions.htm.

non-disclosure and release the documents if the public interest is outweighed by the private interest. *Dept. of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982).

In this case, the Third Circuit used the two-tier standard of review to evaluate the correctness of the District Court's application of the Exemption 6 balancing test. Its approach in that regard conflicts with other circuits which view the balancing test as a question of law which should be reviewed de novo. *News-Press v. U.S. Dep't of Homeland Security*, 489 F.3d 1173 (11th Cir. 2007). It *Id. at* 1188 (11th Cir. 2007)("we squarely held that where, as here, the facts of the case are undisputed and the only issue is the proper balance under FOIA exemption six, the clearly erroneous standard ... is inappropriate."(internal quotation marks and citations omitted)). The Ninth, Fifth and Fourth circuits have held likewise. *Schiffer v. F.B.I.*, 78 F.3d 1405 (9th Cir. 1996); *Halloran v. Veterans Admin.*, 874 F.2d 315, 320 (5th Cir. 1989); *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1246 (4th Cir. 1994).

The Eleventh Circuit explains that the two-tier standard should only be used when "there was a *factual* dispute between the parties as to the very *nature* of the withheld documents, and thus as to whether they even fell within the applicable exemption. And for the most part, determining the factual nature of the withheld documents was dispositive of those plaintiffs' FOIA claims." *News-Press*, 489 F.3d at 1188 (emphasis in original). That was not the situation confronted by the Third Circuit in this case. Here, there were no factual matters in dispute concerning the nature of the withheld records. Indeed, the District Court thought there were none, otherwise it would not have granted

the IRS summary judgment which is only appropriate when "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Since the question before the Third Circuit was primarily one of law, the court's own precedent required it to be decided under a plenary standard of review. *Sheet Metal Workers Intern. Ass'n, Local Union No. 19 v. U.S. Dept. of Veterans Affairs*, 135 F.3d 891, 896 (3d Cir. 1998)("The two tiered standard of review of the district court's determination that a particular document is or is not properly subject to exemption does not, of course, preclude plenary review of issues of law."); *McDonnell v. United States*, 4 F.3d 1227, 1242 (3d Cir. 1993); *Lame v. U.S. Dept. of Justice*, 767 F.2d 66 (3d Cir. 1985).

In the decision for which review is sought, the Third Circuit did not reveal whether it believed the balancing test required by Exemption 6 was a question of law or fact. Under either view however, its use of the two-tier standard gave rise to a conflict, with either its own precedent or that of other circuits.

C. The two-tier standard of review is inconsistent with the standard for summary judgment:

The "clearly erroneous" standard is typically used to evaluate the sufficiency of factual determinations made by a trial court, not legal conclusions which are normally reviewed de novo. Fed.R.Civ.P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless

clearly erroneous..."); *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')"). A motion for summary judgment however, requires a trial court to find that **there are no material facts in dispute** and to apply the relevant legal authorities to those undisputed facts in order to determine whether one party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

Therefore, implicit in every grant of summary judgment is the trial court's conclusion that there are no material facts in dispute, **only** legal issues. For that reason, appeals from summary judgment decisions are usually reviewed de novo. Several circuits have cited this as a reason why summary judgment decisions in FOIA cases should likewise be reviewed de novo. *Petroleum Info. Corp. v. United States Dep't of Interior*, 976 F.2d 1429, 1433 (D.C.Cir.1992)("This circuit applies in FOIA cases the same standard of appellate review applicable generally to summary judgments."); *Halpern v. FBI*, 181 F3d 279, 287 (2d Cir 1999); *Jones v. F.B.I.*, 41 F.3d 238, 242 (6th Cir. 1994). Thus, given its nature, which relies upon an absence of disputed material facts, it would be wholly inconsistent to review a grant of summary judgment under a clearly erroneous standard.

D. Supreme Court precedent suggests that the Exemption 6 balancing test is a question of law which should be reviewed de novo:

In *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989), this Court held that Exemption 7(C) of the FOIA protects an individual's criminal "rap sheet" from disclosure. The case is relevant to this petition because Exemption 7(C) requires the trial court to conduct a public/private interest balancing test which is similar, though less stringent, than the one required by Exemption 6. [6] In *Reporters Committee*, the Court held that this balancing test did not have to be performed on a case-by-case basis but instead could be performed on a categorical basis. *Id.* at 777 ("we conclude today, upon closer inspection of Exemption 7(C), that for an appropriate class of law enforcement records or information a categorical balance may be undertaken there as well."). The Court further noted that this categorical approach applies to all FOIA exemptions. *Id.* at 778 ("This holding-that the provisions regarding segregability, in camera inspections, and burden of proof do not by themselves mandate case-by-case balancing-is a general one that applies to all exemptions.").

---

[6]Whereas Exemption 7(C) requires a showing that the release of a withheld document "could reasonably be expected to constitute an unwarranted invasion of personal privacy," Exemption 6 requires a showing that the release "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C); 5 U.S.C. §552(b)(6).

This holding suggests that once a court makes a factual determination which places a document within a certain category, the subsequent balancing test required by Exemption 6 becomes a question of law, not fact. Since questions of law are generally reviewed de novo, the Third Circuit's use of a clearly erroneous standard was improper.

E. The two-tier standard of review is inconsistent with the Third Circuit's standard of review for Privacy Act appeals:

While the Third Circuit uses the two-tier standard to evaluate FOIA appeals, it uses a de novo standard to evaluate Privacy Act appeals. *Patterson v. Fed. Bureau of Investigation*, 893 F.2d 595, 602 (3d Cir. 1990). The Third Circuit noted this in the opinion for which review is sought. (7a)("Our scope of review of the grant of a motion for summary judgment with respect to disclosure under the Privacy Act is the same as that used by the District Court."). In practice however, federal agencies process requests for records under **both** the Privacy Act and the FOIA, regardless of which statute is cited in the request. *Blazy v. Tenet*, 979 F. Supp. 10, 16 (D.D.C. 1997)("Even where a requester is not entitled to a document under the Privacy Act, he or she may still be entitled to it under the FOIA... Document requests therefore must be analyzed under both Acts."). Since federal agencies view the Privacy Act and FOIA in such a complementary manner, it is inconsistent for the Third Circuit to apply different standards of review to each statute which further highlights the confusion among the Circuits on this issue.

F. FOIA appeals should be reviewed de novo:

There are several sound reasons why a de novo standard should apply to FOIA appeals instead of the more deferential two-tier standard.

First, as explained above, summary judgment decisions in other types of cases are customarily reviewed de novo and there is no good reason to depart from this standard with respect to FOIA cases.

Second, the vast majority of FOIA cases are decided on summary judgment. *Cooper Cameron Corp. v. U.S. Dep't of Labor*, 280 F.3d 539, 543 (5th Cir. 2002) ("Summary judgment resolves most FOIA cases."). Accordingly, the record on appeal will generally consist only of the papers submitted by the parties in connection with the motion for summary judgment. For this reason, the de novo standard does not impose a significantly greater burden on circuit courts than the two-tier standard which requires the court to first determine whether a district court had an adequate factual basis for its decision. *Abdelfattah v. U.S. Dept. of Homeland Sec.*, 488 F.3d 178, 182(3d Cir. 2007). In practice, a circuit court will have to review the same materials under the two-tier standard in order to determine whether a district court had an adequate factual basis for its decision as it would under a de novo standard.

Third, because the majority of FOIA cases are decided on summary judgment, without trial or hearing, there is no reason to give district courts deference on appeal merely because "[t]rial judges have

the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 421 (1996) (internal quotations and citations omitted). Rather, the same "cold paper record" which formed the basis for the district court's decision will be available to the circuit court on appeal.

Fourth, the question of whether a document is protected from disclosure by the FOIA does not usually depend upon highly intensive fact-finding which a district court is better suited to conduct than a circuit court. *Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs*, 183 F. Supp. 2d 1280, 1283 (D. Kan. 2001) ("FOIA cases . . . are especially amenable to summary judgment because the law, rather than the facts, is the only matter in dispute."). Rather, the contents of the document by itself usually determines whether it is exempt from disclosure. As such, FOIA cases do not require district courts to consider "multifarious, fleeting, special, narrow facts that utterly resist generalization" which would make them "better positioned" than circuit courts to decide the applicability of FOIA exemptions which is a factor this Court has noted for giving deference to certain district court determinations on appeal. *Pierce v. Underwood*, 487 U.S. 552, 561-562 (1988); *Koon v. United States*, 518 U.S. 81 (1996); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

Lastly, the FOIA requires a district court to review an agency's decision to withhold records de novo. 5 U.S.C. § 552(a)(4)(B). Because Congress saw

fit to explicitly incorporate that standard into the FOIA, it can be argued that the same standard should be applied by a circuit court on appeal in order to fully carry out Congress' intention of ensuring that citizens are provided with access to Government records to the greatest extent possible under the statute. *Halpern v FBI*, 181 F3d 279, 288 (2d Cir 1999)("[A] pure de novo standard faithfully tracks the language of FOIA, which requires that the court shall determine the matter de novo.")(internal quotations omitted)). On this issue, it has been noted that a de novo standard "is more consistent with Congress' purposes in enacting FOIA" because:

> Congress established-in the absence of one of that law's clearly delineated exemptions-a general, firm philosophy of full agency disclosure, and provided de novo review by federal courts so that citizens and the press could obtain agency information wrongfully withheld. De novo review was deemed essential to prevent courts reviewing agency action from issuing a meaningless judicial imprimatur on agency discretion.

Id. This latter concern, that courts tend to give too much deference to agency decisions, is not purely speculative. One academic study found that of the more than 3600 FOIA cases decided in the district courts between 1990 to 1999, just over 10% were reversed, leading the study's author to conclude that "[d]istrict courts seem to affirm FOIA cases almost instinctively, and by so doing have produced a real world reversal rate that is closer to the hypothesized arbitrary and capricious standard." Paul R. Verkuil, *An Outcomes*

Analysis of Scope of Review Standards, 44 Wm & Mary L Rev 679, 713 (2002).

* * * *

On more than one occasion, this Court has acknowledged the important principles underlying the FOIA. *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) ("FOIA is often explained as a means for citizens to know what their Government is up to. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.")(internal quotations and citations omitted); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). Given this importance, Petitioners respectfully request that the Court grant certiorari to settle the conflict over the proper standard of appellate review in order to ensure that the FOIA is being universally applied across the circuits.

II. REVIEW IS WARRANTED TO SETTLE THE ISSUE OF WHETHER A FEDERAL EMPLOYEE HAS A PRIVACY INTEREST IN PURELY WORK-RELATED RECORDS WHICH IS PROTECTED BY EXEMPTION 6.

In their appeal, Petitioners made it clear that they were not seeking the release of Revenue Officer Williams' time-records to the extent they revealed any of her private information such as her sick leave,

vacation time or home address.[7] Rather, Petitioners sought the release of the records only to the extent that they memorialized the time spent and activities performed by her with respect to the TFRP investigation. (6a). The Third Circuit nonetheless held that Revenue Officer Williams had a privacy interest in this purely work-related information reasoning that she "has a privacy interest in her records as a whole because they are a personal recording of how she spent her time at work." (6a). Review of this holding is warranted because Petitioners are not aware of any case by this Court which has construed the privacy interest protected by Exemption 6 so broadly.

A. The type of privacy interest at issue is not protected by Exemption 6:

This Court has considered the scope of the privacy interests protected by Exemption 6 on several occasions. None of those cases however, involved the type of purely work-related information which is being withheld in this case. See *e.g.*, *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 166 (2004)(decedent's family had a privacy interest in the release of death scene photographs because it would threaten "their own peace of mind and tranquility"); *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 497 (1994)(federal employees had privacy interest in their *home* addresses); *U.S. Dept. of State v. Ray*, 502 U.S. 164, 167-170

---

[7]The FOIA's segregation requirement would clearly permit such private information to be excised from the records. 5 U.S.C. §552(b)("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

(1991)(Haitian nationals who had been involuntarily deported had privacy interest which protected their names and addresses from disclosure); *U.S. Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749 (1989)(private citizen had privacy interest which protected his criminal "rap sheet" from disclosure); *U.S. Dept. of State v. Washington Post Co.*, 456 U.S. 595, 598 (1992)(two Iranian nationals living in Iran had potential privacy interest in passport information which would reveal whether they were U.S. citizens).

The distinguishing feature of the privacy interest at stake in each of the foregoing cases was that it was connected to some aspect of the individual's **private** life. The Supreme Court has noted this distinction:

> The preliminary question is whether Medico's interest in the nondisclosure of any rap sheet the FBI might have on him is the sort of "personal privacy" interest that Congress intended Exemption 7(C) to protect. As we have pointed out before, "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 598-600, 97 S.Ct. 869, 875-877, 51 L.Ed.2d 64 (1977) (footnotes omitted). Here, the former interest, "in avoiding disclosure of personal matters," is implicated.

Reporters Committee, 489 U.S. at 762.

The interest "in avoiding disclosure of personal matters" noted with respect to Exemption 7(C), applies equally to Exemption 6. *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994)("The privacy interest protected by Exemption 6 encompass[es] the individual's control of information concerning his or her person.")(internal quotations omitted); *Department of Air Force v. Rose*, 425 U.S. 352, 375, n. 14 (1976)("the primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters."); *Dept. of State v. Washington Post Co.*, 456 U.S. at 599 ("The House and Senate Reports, although not defining the phrase 'similar files,' suggest that Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.").

The above caselaw suggests that the only type of privacy interests relevant to the Exemption 6 balancing test are those that are "personal" in the sense that they relate solely to some aspect of a person's private life. This interpretation is supported by the Court's reference in *Reporters Committee* to the interest "in avoiding disclosure of personal matters." That interest was derived from the Court's opinions concerning the right to privacy as a matter of substantive due process under the Fourteenth Amendment . *Whalen v. Roe*, 429 U.S. 589, *supra*. The Court addressed the limits of the substantive due process right of privacy as it concerned public officials in *Nixon v. Administrator of General Services*, 433

U.S. 425 (1977). That case involved a Constitutional challenge to the Presidential Recordings and Materials Preservation Act by former President Nixon. With respect to whether he had a privacy right in certain papers and recordings he accumulated while in office, the Court noted: "We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life **unrelated to any acts done by them in their public capacity.**" 433 U.S. 457 (emphasis added). Though *dicta*, this language suggests that public officials, and by extension, public employees, do not have a substantive due process right to privacy in matters which relate solely to their work-related activity. If this logic is extended to Exemption 6, which is not unreasonable given the Court's reference to the substantive due process right "in avoiding disclosure of personal matters" when construing Exemption 7(C), then it follows that a public employee has no right of privacy in purely work-related records which reveal no aspect of the employee's private life. The time records of Revenue Officer Williams clearly are such records because they were created during the course of her employment and Petitioners are only seeking the records to the extent that they relate to her official duties.

Given the above, review of this case is warranted to settle the issue of whether the privacy interest at issue was meant to be protected by Exemption 6.

B. The Third Circuit understated the magnitude of the privacy interest necessary to withhold a document under Exemption 6:

Even if Revenue Officer Williams' privacy interest in the time records is cognizable under Exemption 6, the Third Circuit erred by understating the magnitude of that interest which must be shown to withhold the records.

The Third Circuit concluded that Revenue Officer Williams' privacy interest in her time records outweighed the public interest in disclosure because her "privacy interest in her time records, even if slight, outweighs this weak public interest in their disclosure, and disclosure would be an unwarranted invasion of personal privacy." (7a). This however, misstates the showing required by Exemption 6 which requires a "**clearly** unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). Exemption 7(C) requires an "unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The difference in language between the two exemptions is not merely semantic, instead "the Government's burden in establishing the requisite invasion of privacy to support an Exemption 6 claim is heavier than the standard applicable to Exemption 7(C)." *U.S. Dept. of State v. Ray*, 502 U.S. at 172. Consequently, in conducting the balancing test required by Exemption 6, "the statutory language 'clearly unwarranted' instructs the court to tilt the balance in favor of disclosure." *Getman v. N.L.R.B.*, 450 F.2d 670, 674 (D.C. Cir. 1971). Review and remand of this case is therefore warranted to

ensure that the Third Circuit assigned the proper weight to Revenue Officer Williams' privacy interest.

The privacy interest which Revenue Officer Williams has in her time records is negligible at best. The Third Circuit described that interest as follows: "Williams has a privacy interest in her records as a whole because they are a personal recording of how she spent her time at work." (6a).[8] As explained previously, since those records merely recount the activities she performed as an IRS employee she could not have had a reasonable expectation of privacy with respect to the records. Her status as a public employee is relevant on this point because Government workers, and federal contractors, have been recognized as having a lesser privacy interest with respect to certain aspects of their employment than their purely private-sector counterparts. See *e.g.*, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994)("privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny"); *Sullivan v. Veteran's Administration*, 617 F.Supp. 258 (D.D.C. 1985)("To begin with, the privacy interests of plaintiff, in his capacity as a federal employee, are diminished due to the public interest in knowing how public employees are performing their jobs..."); *International Bhd. of Elec. Workers Local Union No. 5 v. United States Dep't of Hous. and Urban Dev.*, 852 F.2d 87, 89 (3d Cir.1988)("employees have a

---

[8]This **was not** the privacy interest asserted by the IRS. (43a)("Here, Defendants assert that Williams has a personal privacy interest in her time sheets as they include the time she spent investigating taxpayers other than plaintiffs, and also any time she reported as sick leave, vacation time, training, and for other administrative purposes.")(internal quotations omitted).

privacy interest in their salaries. This interest is not as great for employees of federal contractors as for other employees, however, since the Davis-Bacon Act itself requires the posting of wage scales at the job site...").

The diminished expectation of privacy of federal employees is reflected in regulations which permit the following information to be open to public inspection: (1) the employee's name; (2) his present and past position titles; (3) his present and past employment grades; (4) his salary rates, including performance awards and bonuses; (5) his present and past duty stations, including room numbers, shop designations, or other identifying information regarding buildings or places of employment; and (6) the employee's position descriptions, identification of job elements and performance standards. 5 C.F.R. §293.311.

Caselaw also shows that certain employment information pertaining to federal employees which would normally be confidential in the private-sector is accessible by the public. *Core v. United States Postal Serv.*, 730 F.2d 946, 948 (4th Cir. 1984) (employment histories of successful Postal Service job applicants are disclosable); *Nat'l W. Life Ins. v. United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (no expectation of privacy in names and duty stations of Postal Service employees); *Associated Gen. Contractors, Inc. v. EPA*, 488 F. Supp. 861, 863 (D. Nev. 1980) (information regarding education, former employment, academic achievements and qualifications of employees is not so personal that disclosure would constitute a clearly unwarranted invasion of personal privacy).

The above authorities demonstrate that the privacy interests of federal employees in their work-related records is lessened by the mere fact that they are federal employees. As such, Revenue Officer Williams cannot be expected to have more than a de minimis privacy interest in the time-records sought by Petitioners.

C. Supreme Court precedent suggests that Exemption 6 requires a "significant" privacy interest:

The facts of this case suggest that Revenue Officer Williams had a minimal, if any, interest in her time-records. Indeed, the Third Circuit characterized her interest as "slight." (7a). This Court's decision in *U.S. Dept. of State v. Ray*, 502 U.S. 164, *supra*, suggests that a greater interest was necessary.

In *Ray*, a lawyer representing a group of Haitians seeking political asylum brought a FOIA suit to compel the Government to disclose the identities of Haitian refugees whose names had been redacted from reports of interviews by State Department personnel after the refugees had been involuntarily returned to Haiti. The lawyer made the request to bolster his clients' demands for asylum by showing that they would face persecution if returned to Haiti. Although this Court eventually upheld the Government's refusal to release the returnees' names on the basis of Exemption 6, it did so only after finding that the disclosure of their identities would likely result in a significant invasion of their personal privacy. Specifically, the release of the information would: [1] reveal "highly personal information regarding marital

and employment status, children, living conditions and attempts to enter the United States"; [2] would publicly identify the interviewees as people who cooperated with an investigation of the Haitian Government; [3] could subject them or their families to "embarrassment in their social and community relationships"; [4] may subject them to retaliatory action; and [5] the disclosure would be a "special affront" to their privacy because they gave the interviews pursuant to an assurance of confidentiality. *U.S. Dept. of State v. Ray*, 502 U.S. at 175-176. Based upon these compelling threats to personal privacy, the Court was "satisfied that the proposed invasion of the *serious privacy interest* of the Haitian returnees is clearly unwarranted." *Id.* at 178. (emphasis added).

The threats to personal privacy recited by the Court in *Ray* suggest that more than a "slight" privacy interest must be at stake in order to satisfy the "clearly unwarranted" language of Exemption 6. Rather, the privacy interest must be significant and not de minimis. *Id.* at n.12 ("we are not implying that disclosure of a list of names and other identifying information is inherently and always a significant threat to the privacy of the individuals on the list. Instead, we agree with the Court of Appeals for the District of Columbia Circuit that whether disclosure of a list of names is a significant or a de minimis threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.")(internal quotations omitted).

The *Ray* court cited with approval *National Assn. of Retired Federal Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989). *Id.* This is notable because

that opinion noted that Exemption 6 requires a court to determine whether "disclosure would compromise a substantial, as opposed to a de minimis, privacy interest."" 879 F.2d at 874, supra. On this point, the court commented:

> If no significant privacy interest is implicated (and if no other Exemption applies), FOIA demands disclosure... If, on the other hand, a substantial privacy interest is at stake, then we must weigh that privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy.

Id. at 874.

These references to "substantial" and "significant" privacy interests suggest that more than a "slight" privacy interest is necessary to satisfy the Exemption 6 balancing test. Therefore, review of the case is warranted in order to clarify this point.

D. The public interest in disclosure of the time records outweighs any private interest Revenue Officer Williams may have in the records:

In contrast to Revenue Officer Williams' negligible interest, the public has a strong interest in her time records because the records will shed light on the operations of the IRS.

In performing the balancing test required by Exemption 6, "the only relevant interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." *U.S. Dep't of Defense v. Fed. Labor Relations Authority*, 510 U.S. 487, 495 (1994)(internal quotations omitted). The public is considered to have an interest if "disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997)(internal citations and quotations omitted).

The release of Revenue Officer Williams' time records will shed light on the manner in which the IRS conducts civil tax investigations, which is one of its primary functions. This interest clearly weighs in favor of disclosure. *Cooper Cameron Corp. v. U.S. Dept. of Labor*, 280 F.3d 539, 554 (5th Cir. 2002)(("in the context of exemption 7(C), the public interest in monitoring OSHA's investigation outweighs any possible interest in effective enforcement or protection of employees from retaliation, neither of which has sway here") .

The public has other valid interests which may be served by the release of the time records. For instance, "the public has an interest in whether public servants carry out their duties in an efficient and law-abiding manner." *Columbia Packing Co., Inc. v. U.S. Dept. of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977). The public also has an interest in knowing that a

Government investigation was comprehensive. *Stern v. FBI*, 737 F.2d 84, 92 (D.C.Cir.1984).

Lastly, the underlying investigations presumably consumed numerous hours of IRS employee time. Since all IRS operations are funded by the American taxpayer, the public has a general interest in seeing that the agency uses the budget monies allotted to it in an efficient and cost-effective manner. *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 311 (6th Cir. 2002)("The costs and benefits of government investigations are diffuse, and therefore managing those costs and benefits most efficiently is definitionally in the public interest."). The release of Revenue Officer Williams' time records will serve this interest by revealing the total hours she spent on the investigation and the tasks she performed during the investigation. That information will provide insight into the overall expense of conducting such investigations, a cost which is ultimately borne by the public. The activities performed by Revenue Officer Williams during the investigation are also of interest to the public because the release of such information will permit an inquiry into whether it would be more cost-effective to have the private-sector perform certain investigatory tasks instead of IRS employees (*e.g.*, the retrieval of records from the local tax assessor's office, searching of deed/land records, *etc.*).

Given the above, it is clear that the public's interest in the disclosure of Revenue Officer Williams' time records outweighs any privacy interest she may have in those records and therefore the Third Circuit

erred in holding that such records were protected from disclosure by Exemption 6.

III. REVIEW IS WARRANTED TO SETTLE THE ISSUE OF WHETHER THE TIME RECORDS OF A FEDERAL EMPLOYEE WHICH WERE CREATED IN CONNECTION WITH AN INVESTIGATION BY THE EMPLOYEE "PERTAIN" TO THE INDIVIDUAL WHO WAS THE TARGET OF THE INVESTIGATION SO AS TO BE OPEN TO INSPECTION BY THAT INDIVIDUAL UNDER THE PRIVACY ACT.

The Third Circuit held that Revenue Officer Williams' time records did not have to be released under the Privacy Act because "the time records pertain to Williams, not Berger, and cannot, absent the consent of Williams, be released under the Privacy Act." (8a).[9] The court reasoned that the "time records were created pursuant to the conditions of her employment, not, as appellants suggest, 'in connection with' her investigation of them" and the "records record the time Williams spent performing her job duties – investigating other taxpayers as well as appellants, training, and administrative work – as well as her vacation time and sick leave." (8a). Review of this holding is necessary because there is nothing in the statutory language which supports such a restrictive view of the scope of persons entitled to access records under the Act.

---

[9]The Privacy Act does not apply to corporations and therefore the request under the statute was only made on behalf of Petitioner, Lawrence S. Berger. 5 U.S.C. § 552a(a)(2).

A. The time-records "pertained" to Petitioners:

The Privacy Act allows an individual "to gain access to his record or to any information pertaining to him" which is contained in a "system of records" maintained by an agency. 5 U.S.C. §552a(d). Therefore, provided a document is within an agency's system of records it merely has to contain "any information pertaining to" an individual in order to be open to inspection by that individual. Accordingly, the Third Circuit has construed the type of records covered by the Privacy Act broadly to include "any information about an individual that is linked to that individual through an identifying particular and is not to be restricted to information that reflects a characteristic or quality of an individual." *Quinn v. Stone*, 978 F.2d 126, 133 (3d. Cir. 1992). This holding was cited with approval by the Fourth Circuit, which noted that "the legislative history of the Act makes it clear that a record was meant to include as little as one descriptive item about an individual." *Williams v. Department of Veterans Affairs*, 104 F.3d 670 (4th Cir. 1997)(internal quotations omitted). Since the time records were created in connection with an investigation of Petitioners, the records "pertain" to them in the same manner in which an attorney's billing records "pertain" to his client or a doctor's medical records "pertain" to his patient. As a result, Petitioners have a sufficient connection to the time records to demand their release under the Privacy Act.

The Third Circuit rejected this conclusion, apparently because the time records were not devoted solely to Revenue Officer Williams' investigation of

Petitioners, but also included "the time Williams spent performing her job duties – *investigating other* taxpayers as well as appellants, training, and administrative work – as well as her vacation time and sick leave." (8a). The fact that the records may contain information unrelated to Petitioners does not permit them to be withheld because the Privacy Act permits an individual to gain access to "his record" and "to any information pertaining to him." This latter phrase would be superfluous if Congress meant to restrict an individual to have access only to a record devoted solely to the individual as the Third Circuit seems to suggest.

B. The time-records were within a "system of records":

The Privacy Act defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). Numerous courts have relied on this definition to hold that an individual has no right of access to records under the Act if the records are not indexed and retrieved by the individual's name or personal identifier. See *e.g.*, *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 360 (3d Cir. 1985). The time records in dispute are retrievable by taxpayer name and therefore are within the scope of records accessible to Petitioners under the Privacy Act.

According to the Internal Revenue Manual ("IRM"), the IRS is able to keep track of employee time using the "ENTITY Case Management System" which is described as "an automated system used at the

individual, group, territory, area, and national levels" which "uses the data from the Integrated Collection System (ICS) for case management, report compilation, and management information." IRM §5.3.1.1(04-01-2007). [10] The IRM explains that time reported by revenue officers, on open and closed cases, is maintained in the system "for each case worked" along with the "[c]urrent and past activity per case." *Id.* It is further explained that the system allows users "to customize on-line queries" and to "build, view, and print various reports." *Id.* This shows that the IRS is fully capable of isolating and retrieving an employee's time records which relate to a specific taxpayer's case. This includes the time records of Revenue Officer Williams as they relate to her investigation of Petitioners. The records can therefore be deemed to be contained within "a system of records cued to the requestor's own name or identifier" as is required to bring them within the scope of the Privacy Act.

C. The fact that the time records may also pertain to Revenue Officer Williams' does not bar access to the records:

The fact that the time records may pertain to Revenue Officer Williams as well as Petitioners does not bar their release under the Privacy Act. Therefore, the Third Circuit erred in holding that the consent of Revenue Officer Williams was needed before the records could be released. (8a).

---

[10]This section is available on the IRS website at: http://www.irs.gov/irm/part5/ch03s01.html

First, the records were required to be released under the FOIA which triggers an exception to the Privacy Act's prohibition against releasing records without the consent of the party to whom the records pertain. 5 U.S.C. 552a(b)(2)("No agency shall disclose any record ... unless disclosure of the record would be—required under section 552 of this title").

Second, the Privacy Act does not contain an exemption which protects a third-party's privacy. The only exemption which comes close is found in subsection (k)(5) of the Act and that exemption merely protects confidential source-identifying information in background security investigative systems. 5 U.S.C. § 552a(k)(5). Therefore, if a record concerns two people, the record may be retrieved by either person without the consent of the other. *Voelker v. IRS*, 646 F.2d 332, 334 (8th Cir. 1981)("it defies logic to say that information properly contained in a person's record does not pertain to that person, even if it may also pertain to another individual"); *Topuridze v. USIA*, 772 F. Supp. 662, 665 (D.D.C. 1991); *Henke v. United States Department of Commerce*, 1996 WL 692020 at *4 (D.D.C. 1994), aff'd on other grounds, 83 F.3d 1445 (D.C. Cir. 1996).

D. The time records are not exempt from disclosure under the Privacy Act as "investigatory material compiled for law enforcement purposes":

The Privacy Act permits agencies to exempt from disclosure several categories of documents including "investigatory material compiled for law

enforcement purposes..." 5 U.S.C. §552a(k)(2). This provision does not apply to the disputed time records.

The above exemption only applies if the agency actually promulgates rules exempting the subject records from disclosure. 5 U.S.C. §552a(k)("The head of any agency may promulgate rules... to exempt any system of records within the agency..."). The Department of the Treasury has not exempted the subject time records from disclosure under the Privacy Act. The systems of records which have been exempted from disclosure pursuant to subsection (k)(2) of the Privacy Act are identified in 31 C.F.R. § 1.36(g)(viii). Although that section lists numerous systems of records, it does not exempt the time records of revenue officers involved in civil investigations. This is in contrast to the time records of IRS agents who perform criminal investigations which are exempted from disclosure. 31 C.F.R. § 1.36(c)(viii)(exempting from disclosure the system of records designated: "Case Management and Time Reporting System, Criminal Investigation Division."). Since the TFRP investigation of Petitioners was civil, not criminal, this exemption does not bar release of the time records.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,
DENNIS CALO
Counsel of Record
FRANK AGOSTINO
JAMES J. BONICOS
Calo Agostino, P.C.
The Bank House
14 Washington Place
Hackensack, NJ 07601
(201) 488-5400
Attorneys for Petitioners

(any footnotes trail end of each document)

No. 07-2796

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LAWRENCE S. BERGER; REALTY RESEARCH CORPORATION, Appellants

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF THE TREASURY

June 25, 2008, Submitted Under Third Circuit LAR 34.1(a)

August 11, 2008, Opinion Filed

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. (D.C. Civil No. 05-cv-03854). District Judge: The Honorable Harold A. Ackerman.

JUDGES: Before: SLOVITER, BARRY and ROTH, Circuit Judges.

OPINION

BARRY, *Circuit Judge*

Appellants Lawrence S. Berger and Realty Research Corporation ("RRC") (together "appellants") appeal the District Court's order granting summary judgment to appellees the Internal Revenue Service ("IRS") and the Department of Treasury ("DOT") and denying appellants' request for disclosure of documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and certain provisions of the Internal Revenue Code ("IRC"). We will affirm.

I.

Appellants were the subjects of a civil Trust Fund Recovery Penalty ("TFRP") investigation and criminal investigation by the IRS. The investigation did not result in any charges against either of them. On December 8, 2003, they wrote to the IRS requesting records pertaining to themselves and to the investigations of them under the FOIA, the Privacy Act, and the IRC. In addition to other records, appellants requested the time records of Revenue Officer Mary Williams, who conducted the TFRP investigation.

The IRS responded on July 23, 2004, releasing 459 pages of documents, but advised appellants that it was withholding in full or in part numerous documents exempt from disclosure under FOIA. On August 27, 2004, appellants appealed and expanded the scope of their document request. On July 15, 2005, the IRS

Appeals Office released additional documents, but reaffirmed its decision to withhold the rest.

On August 3, 2005, appellants filed a complaint in the District Court seeking disclosure of the withheld documents. The case was referred to Mary Ellen Keys, an attorney at the IRS's Office of Assistant Chief Counsel for Disclosure and Privacy Law. On June 6, 2006, appellants wrote to the IRS, again expanding the scope of their document request. On or about August 15, 2006, the IRS released approximately 900 additional pages.

On October 27, 2006, appellees moved for summary judgment, arguing that the remaining pages had been properly withheld. Affidavits from IRS officers were submitted in support of the motion, including the Declaration of Ms. Keys, explaining which pages had been withheld and the reasons for withholding them. Keys stated that Officer Williams's time records consisted of 711 pages that were being withheld in their entirety under 5 U.S.C. § 552(b)(6) ("Exemption 6"). Keys noted that, in addition to Exemption 6, the time records could also be withheld under 5 U.S.C. § 552(b)(3) ("Exemption 3"), in conjunction with 26 U.S.C. § 6103(a), because the information largely consisted of information relating to third-party taxpayers.

On December 8, 2006, appellants filed a brief in opposition to appellees' motion and submitted a copy of the "Vaughn" index prepared by the IRS in conjunction with the summary judgment motion.[1] On January 9, 2007, the IRS informed the District Court that it intended to release additional pages, and, on January 19, 2006, twenty-two pages were released. On January

12, 2007, appellees filed a reply brief together with additional affidavits, including another Declaration of Ms. Keys responding to arguments made in appellants' brief. Keys stated that the IRS had withheld Officer Williams' time records under Exemption 6 because they were a "personal accounting of the time spent on the job," reporting time spent examining various taxpayers and time reported as sick leave, vacation time, training, and other administrative reasons, and that disclosure would be a "clearly unwarranted invasion of personal privacy." App. at 388. On May 22, 2007, the District Court granted appellees' motion for summary judgment, finding that the balance of the time records had been properly withheld under Exemption 6, and that the Privacy Act did not otherwise require their disclosure. Appellants timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Appellants argue that Officer Williams's time records are not protected by Exemption 6 of the FOIA, their release is required under the Privacy Act, and that the District Court abused its discretion by declining to conduct an *in camera* review of the remaining documents withheld by the IRS.

When reviewing an order of a district court granting summary judgment in proceedings seeking disclosure under the FOIA, a reviewing court must determine whether the district court had an adequate factual basis for its decision and, if so, whether that decision was clearly erroneous. *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 182 (3d Cir. 2007). We will reverse only "if the findings are unsupported by

substantial evidence, lack adequate evidentiary support in the record, are against the clear weight of the evidence or where the district court has misapprehended the weight of the evidence." *Id.*, quoting *Lame v. U.S. Dep't of Justice*, 767 F.2d 66, 70 (3d Cir. 1985).

Exemption 6 of the FOIA exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To determine whether the exemption applies, courts balance the public interest in disclosure against the privacy interest protected by the exemption. *Sheet Metal Workers Int'l Assn, Local Union No. 19 v. U.S. Dep't of Veterans Affairs*, 135 F.3d 891, 897 (3d Cir. 1998). There is a presumption in favor of disclosure, and the agency has the burden of proving that an exemption applies. *Id.*

Appellants first argue that Officer Williams's time records are not "similar files" that would be expected to contain the type of personal information Exemption 6 was designed to protect, and instead merely reflect the activities she performed while investigating appellants or performing other work-related functions. However, the term "similar files" is construed broadly and not limited to those files that contain intimate details or highly personal information. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982). Rather, the exemption is intended to cover records that can be "identified as applying to that individual." *Id.* at 602. Williams's time records are a personal recording of the time expended

as an employee and therefore can be identified as applying to her.

Appellants argue that even if the time records are "similar files," Officer Williams has only a minimal, if any, privacy interest in those records. They argue, moreover, that even assuming she has a privacy interest in those parts of her time records containing personal information, this does not explain why the rest of those records are protected. Williams, they argue, would not be expected to have a privacy interest in those parts of the records that merely recount the activities performed during the course of her official duties as an employee of the IRS. We disagree. Williams has a privacy interest in her records as a whole because they are a personal recording of how she spent her time at work. Whether some parts contain information not subject to an exemption goes to whether those parts are segregable from the portions that are exempt,[2] and the District Court found they were not. Moreover, "even a slight privacy interest will tip the scales in favor of non-disclosure" when balanced against a weak public interest in disclosure. *Sheet Metal Workers Int'l Ass'n, Local Union No. 19*, 135 F.3d at 904.

Appellants argue that the District Court erroneously found both that the public did not have an interest in the time records and that Officer Williams's privacy interest outweighed any public interest in disclosure. When balancing the privacy interest against the public interest in disclosure, the only relevant public interest is the extent to which disclosure would "serve the 'core purpose of the FOIA,' which is 'contributing significantly to public understanding of the operations

or activities of the government.'" *Id.* at 897 (quoting *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 114 S. Ct. 1006, 127 L. Ed. 2d 325(1994)) (emphasis omitted).

Appellants maintain that the public has an interest in the manner in which the IRS conducts civil tax investigations, whether public servants carry out their duties in an efficient and law-abiding manner, whether investigations are comprehensive, and whether budget monies are allotted in an efficient and cost-effective manner. Disclosure of Officer Williams's time records, however, would not "contribute significantly" to the public understanding of the operations of the IRS or "appreciably further the citizens['] right to be informed about what their government is up to." *Id.* at 900 (quoting *Dep't of Defense*, 510 U.S. at 497). Indeed, disclosure of her records would only serve appellants' narrow interest in knowing how she investigated their particular case. Williams's privacy interest in her time records, even if slight, outweighs this weak public interest in their disclosure, and disclosure would be an unwarranted invasion of personal privacy. [3]

III.

Our scope of review of the grant of a motion for summary judgment with respect to disclosure under the Privacy Act is the same as that used by the District Court. *Patterson v. Fed. Bureau of Investigation*, 893 F.2d 595, 602 (3d Cir. 1990). We must decide whether there is a genuine issue as to any material fact in dispute, assuming resolution of the disputed fact in favor of the non-moving party, and determine whether

the moving party is entitled to judgment as a matter of law. *Id.*

Appellants argue that the time records should have been released to them under the Privacy Act because they include information pertaining to Berger [4] that can be retrieved by taxpayer name. [5] Under the Privacy Act, an individual may request from an agency access to his records or to "any information pertaining to him" which is maintained in a system of records from which information is retrieved by the name of the individual or some other identifier assigned to that individual. 5 U.S.C. § 552a(a)(5) and (d)(1). Records shall not be disclosed "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." *Id.* § 552a(b).

Officer Williams's time records were created pursuant to the conditions of her employment, not, as appellants suggest, "in connection with" her investigation of them. Reply Br. at 8. Those records record the time Williams spent performing her job duties -- investigating other taxpayers as well as appellants, training, and administrative work -- as well as her vacation time and sick leave. Therefore, the time records pertain to Williams, not Berger, and cannot, absent the consent of Williams, be released under the Privacy Act.

IV.

Finally, appellants argue that the District Court abused its discretion by failing to perform an *in camera* review of the "relatively few remaining documents" that were withheld. Reply Br. at 25. Review was necessary, they argue, to ensure that the IRS had complied with the

FOIA's segregation requirement and because the IRS's conduct and affidavits suggested that it was not withholding documents in good faith. The FOIA permits a district court to examine *in camera* the contents of agency records that have been withheld. 5 U.S.C. § 552(a)(4)(B). Such review is discretionary. *Hilton v. Dep't of Justice*, 844 F.2d 126, 128 (3d Cir. 1988). *In camera* review, however, should not be resorted to "routinely" and is unnecessary if agency affidavits or other showings are specific. *Ferri v. Bell*, 645 F.2d 1213, 1225-26 (3d Cir. 1981).

The District Court concluded that *in camera* review was not warranted because it was "satisfied with the detail and specificity" of the IRS's affidavits, in particular the Declarations of Ms. Keys, and of the Vaughn index, and because there was no evidence that the IRS acted in bad faith. App. at 14. The District Court did not abuse its discretion in so concluding. Moreover, the IRS was at all times responsive to appellants' requests and, indeed, re-reviewed the records each time appellants expanded the scope of their document requests and, again, after they submitted their brief on the motion for summary judgment.

V.

We will affirm the judgment of the District Court.

Footnotes

1A "Vaughn" index is an affidavit that supplies an index of withheld documents and details the agency's justification for claiming an exemption. *Patterson v.*

Fed. Bureau of Investigation, 893 F.2d 595, 599 n.7 (3d Cir. 1990).

2When responding to requests for the release of documents, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. 552(b). The District Court found that "considering the extensive amount of personal information" in the time records, they "may not be reasonably segregated such that only information which would not clearly invade Williams's personal privacy would be disclosed." App. at 35. Ms. Keys's Declarations support this finding.

3Because we hold that Officer Williams's time records are exempt under Exemption 6, we need not reach the issue of whether they are also exempt under Exemption 3.

4The Privacy Act only applies to the records of individuals and therefore this challenge is to records pertaining to Berger only.

5The parties dispute for the first time on appeal whether time records are retrievable from an IRS system of records by taxpayer name. In the District Court, the parties limited their Privacy Act arguments to whether the time records pertained to Berger. We do so as well, and agree with the District Court that they do not.

Civil Action No. 05-3854 (HAA)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LAWRENCE S. BERGER and REALTY RESEARCH CORPORATION, Plaintiffs,

v.

INTERNAL REVENUE SERVICE and DEPARTMENT OF THE TREASURY, Defendants.

May 22, 2007, Decided
May 22, 2007, Filed

COUNSEL: Frank Agostino, Esq., James J. Bonicos, Esq., CALO AGOSTINO, P.C., Hackensack, New Jersey, Attorneys for Plaintiffs.

Christopher J. Christie, Esq., United States Attorney, Gerald A. Role, Esq., Trial Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Attorneys for Defendants.

JUDGES: Harold A. Ackerman, U.S.D.J.

OPINION

OPINION AND ORDER

ACKERMAN, Senior District Judge:

This matter comes before the Court on the motion for

summary judgment (Docket No. 10) filed by Defendants Internal Revenue Service and the Department of the Treasury (collectively "IRS" or "Defendants"). Plaintiffs Lawrence S. Berger and Realty Research Corporation ("RRC") brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, tc compel disclosure of certain documents from the IRS relating to the civil and criminal tax investigation of which Plaintiffs were the subjects. For the following reasons, Defendants' motion for summary judgment will be granted.

Background

Plaintiffs were the subject of a civil Trust Fund Recovery Penalty ("TFRP") investigation and related criminal investigation ("CI") by the IRS.[1] Berger resides in Morristown, New Jersey, and RRC is a New Jersey corporation with its principal place of business at Berger's address in Morristown. Revenue Officer Mary M. Williams handled the civil TFRP inquiry in the IRS's small business/self-employed field office in Parsippany, New Jersey, and Special Agent Eric Rennert handled the CI in the IRS's criminal investigation field office in Springfield, New Jersey. No charges were ever brought against Plaintiffs as a result of these investigations.

I. Plaintiffs' Initial FOIA Request

On December 8, 2003, Plaintiffs' counsel submitted a FOIA and Privacy Act request to the IRS requesting the release to counsel of documents relating to the investigations of Plaintiffs. The FOIA request included

demands for the entire civil and criminal investigatory files maintained by Williams and Rennert; all IRS forms and other documents relevant to the TFRP inquiry and unpaid taxes by Plaintiffs; a list of third parties contacted by the IRS during the civil and criminal investigations; and time records kept by Williams relating to the civil investigation. Along with the request, counsel submitted two Power of Attorney forms: one for Berger authorizing disclosure of TFRP-related documents for tax years 1998-2003, and another for RRC authorizing disclosure of employment tax-related matters for tax years 1998-2003.

Plaintiffs' FOIA request was referred to Senior Disclosure Specialist Joseph A. Reidy in the IRS's Disclosure Office in Springfield, New Jersey. After determining that all responsive documents would be found in the field office files of Williams and Rennert, Reidy obtained and reviewed these files. In a letter to Plaintiffs' counsel dated July 23, 2004, the Disclosure Office responded to Plaintiffs' request. The entire CI file was withheld because the information in the CI file was beyond the scope of the Power of Attorney forms submitted by counsel. The IRS concluded that certain documents in the civil TFRP file were exempt from disclosure, in whole or in part, under various FOIA exemptions.[2] Of the 459 pages of the TFRP file found responsive to Plaintiffs' request, the Disclosure Office withheld 19 pages in whole or in part pursuant to FOIA exemptions. The IRS also withheld 70 pages in full and 64 pages in part where the information pertained to tax years or matters outside the scope of the Power of Attorney forms.

II. Plaintiffs' Administrative Appeal

By letter dated August 27, 2004, Plaintiffs' counsel filed an administrative appeal of the Disclosure Office's decision with the IRS Appeals Office in Riverside, California. Counsel challenged the IRS's failure to provide a detailed description of the information withheld and the reason for withholding. Such a document is commonly called a *Vaughn* index: "an index correlating each withheld document, or a portion thereof, with a specific exemption and relevant part of an agency's justification for nondisclosure." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1047 n.1 (3d Cir. 1995) (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)). Counsel also complained that the IRS failed to conduct a reasonable search because it produced no documents from the IRS's Service Center or from a Federal Records Center. Along with the appeal, counsel submitted an additional Power of Attorney form with regard to Berger, broadening the scope of the power of attorney granted to counsel to include tax and TFRP information for the tax years 1996 to 2004.

Appeals Officer Heidi Peterson handled the appeal. Peterson determined that all responsive documents were located in the files maintained by Williams and Rennert in their respective field offices, and that there were no responsive documents at any Service Center. In a letter dated July 15, 2005, the Appeals Office resolved Plaintiffs' appeal, affirming in part and reversing in part the Disclosure Office's determination. Based upon its review and the new Power of Attorney form, the Appeals Office disclosed an additional 16 pages in full and 8 pages in part from the civil TFRP file. The Appeals Office affirmed the withholding of the remaining undisclosed portions of the TFRP file for the reasons stated by the Disclosure Office. With regard to

the CI file, the Appeals Office, based in part on the new Power of Attorney form, reviewed the over 2,300 pages of the CI file and disclosed to counsel 844 pages in full and 151 pages in part. Approximately 1,370 pages were withheld in full or in part pursuant to FOIA exemptions. Some pages were withheld because the information in those pages still fell beyond the scope of the Power of Attorney forms submitted by counsel. The Appeals Office also informed counsel that Plaintiffs were not entitled to a *Vaughn* index on administrative appeal. [3]

III. Plaintiffs' Complaint and the IRS's Post-Complaint Review

Plaintiffs filed the Complaint in this matter on August 3, 2005, seeking disclosure of the information withheld by the IRS. The Complaint contains five counts, seeking disclosure pursuant to: 1) FOIA; 2) the Privacy Act; 3) Internal Revenue Code ("I.R.C.") § 6103; 4) I.R.C. § 6203; and 5) I.R.C. § 7602(c).[4] Plaintiffs' case was referred for review to Mary Ellen Keys in the IRS's Office of Assistant Chief Counsel for Disclosure and Privacy Law. Keys reviewed the entire administrative history and the documents withheld by the IRS. Approximately ten months after filing their Complaint, Plaintiffs' counsel submitted two additional Power of Attorney forms again expanding the scope of authorized disclosure. Based on this expanded authority and on her review of this matter, Keys, in August 2006, authorized the disclosure of approximately 900 pages, in whole or in part, from the TFRP and CI files previously withheld by the Appeals Office. Keys also authorized, in October 2006, the disclosure of a list of third parties contacted by the IRS

in its investigations. She additionally authorized the disclosure of several IRS forms that were not disclosed by the Appeals Office. All of these documents have been released to Plaintiffs. The IRS asserted FOIA exemptions with regard to the remainder of the responsive documents sought by Plaintiffs, and Keys's Declaration submitted in support of the instant motion provides detailed grounds for the IRS's assertion of various FOIA exemptions. The remaining documents withheld by the IRS included:

> * 6 pages in full and 2 pages in part of the CI file pursuant to Exemption 3 in conjunction with I.R.C. § 6103(a) where the information concerned third-party return information;
>
> * 64 pages in full and 1 page in part of the CI file pursuant to Exemption 3 in conjunction with 31 U.S.C. § 5319 where the documents consist of Currency Transaction Reports ("CTRs") and other reports compiled by the IRS (or information from such reports) and exempt from disclosure by § 5319; [5]
>
> * 4 pages in full pursuant to Exemption 5 where the documents are subject to a litigation privilege;
>
> * 21 pages in full and 357 pages in part pursuant to Exemption 7(C) where disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy; and
>
> * 711 pages in full pursuant to Exemption 6 where the information involves time records of

Williams kept during the investigation of Plaintiffs and where disclosure would constitute a clearly unwarranted invasion of personal privacy.

IV. Defendants' Motion for Summary Judgment and the IRS's "Re-Review"

Defendants filed the instant motion for summary judgment on October 27, 2006. Defendants support their motion with affidavits from Reidy, Rennert, Peterson, Keys, and Department of Justice trial counsel Gerald A. Role. In responding to Defendants' motion, Plaintiffs submitted the *Vaughn* Index prepared by the IRS and provided to Plaintiffs during this litigation. Keys again reviewed Plaintiffs' request and arguments following receipt of their response to Defendants' motion. Shortly before filing its reply papers, the IRS released to Plaintiffs an additional 22 pages of documents previously withheld under Exemption 3 in conjunction with 31 U.S.C. § 5319. These pages were disclosed because they contained information not drawn from CTRs and other statutorily-exempt reports. Keys's Second Declaration, submitted with Defendants' reply papers, contains a detailed response to Plaintiffs' summary judgment brief based on the IRS's "re-review" and reasserted and elaborated upon the IRS's reliance on various FOIA exemptions.

Analysis

I. Summary Judgment Standard

On this motion, this Court must assess Defendants' basis for refusing to disclose the remaining withheld

information. FOIA cases are routinely resolved on summary judgment. *Manna v. U.S. Dep't of Justice*, 832 F. Supp. 866, 870 (D.N.J. 1993) (Ackerman, J.) (*Manna II*), *aff'd*, 51 F.3d 1158 (3d Cir. 1994) (*Manna III*); *see also Lewis v. U.S. Envt'l Protection Agency*, Civil Action No. 06-2660, 2006 U.S. Dist. LEXIS 80936, 2006 WL 3227787, at *2 (E.D. Pa. Nov. 3, 2006) ("Summary judgment is the primary avenue for resolving a FOIA dispute."). Pursuant to Federal Rule of Civil Procedure 56(c), a motion for summary judgment will be granted

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); *see also Todaro v. Bowman*, 872 F.2d 43, 46 (3d Cir. 1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987). Summary judgment may be granted only if the movant shows that "there exists no genuine issue of material fact that would permit a reasonable jury to find for the nonmoving party." *Miller v. Ind. Hosp.*, 843 F.2d 139, 143 (3d Cir. 1988). An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is material if it influences the outcome under the governing law. *Id.* at 248; *see also Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1109 (3d Cir. 1985).

The substantive law will identify which facts are

"material." *Anderson*, 477 U.S. at 247-48. Therefore, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. *Id.* A district court faced with a summary judgment motion must view all evidence and the inferences to be drawn therefrom in the light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *see also Peters v. Del. River Port Auth. of Pa. & N.J.*, 16 F.3d 1346, 1349 (3d Cir. 1994). It is inappropriate for a district court to resolve factual disputes or make credibility determinations at the summary judgment stage. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). Indeed, "where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Id.*

This does not mean, however, that a district court may ignore the weight of the evidence. *Id.* "[I]f the non-movant's evidence on any essential element of the claims asserted is merely 'colorable' or is 'not significantly probative,' the court should enter summary judgment in favor of the moving party." *Peterson v. Am. Tel. & Tel. Co.*, 2004 U.S. Dist. LEXIS 854, Civ. A. No. 99-4982, 2004 WL 190295, at *3 (D.N.J. Jan. 9, 2004) (quoting *Anderson*, 477 U.S. at 249). Therefore, to raise a genuine issue of material fact, the summary judgment opponent "'need not match, item for item, each piece of evidence proffered by the movant,' but simply must exceed the 'mere scintilla' standard." *Petruzzi's IGA Supermarkets, Inc. v. Darling-*

Delaware Co., Inc., 998 F.2d 1224, 1230 (3d Cir. 1993); *see also Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant].").

These general summary judgment standards apply with equal force to a FOIA/Privacy Act action. *Pipko v. CIA*, 312 F. Supp. 2d 669, 674 (D.N.J. 2004). To prevail on a summary judgment motion, the agency's affidavits must "describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption" and "are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Davin*, 60 F.3d at 1050 (citations omitted). The Court may award summary judgment "on the basis of agency affidavits alone where the affidavits are sufficiently detailed and in good faith." *Manna II*, 832 F. Supp. at 870; *see also, e.g., Amro v. U.S. Customs Serv.*, 128 F. Supp. 2d 776, 782 (E.D. Pa. 2001) ("The affidavits must be detailed, nonconclusory, and in good faith."). The Court must review the IRS's determinations *de novo* and the IRS bears the burden to sustain its withholding of certain documents pursuant to a FOIA exemption. 5 U.S.C. § 552(a)(4)(B); 5 U.S.C. § 552a(g)(3)(A); *see also, e.g., Manna III*, 51 F.3d at 1163; *Pipko*, 312 F. Supp. 2d at 675.

Summary judgment should be granted "where the agency can demonstrate that the documents withheld fall within one of the nine statutory exemptions." *Manna II*, 852 F. Supp. at 875. "If the Government

fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the government's position." *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 544 (6th Cir. 2001). However, FOIA exemptions must be narrowly construed. *Manna II*, 832 F. Supp. at 870. Furthermore, an entire document generally is not exempt merely because a portion of the document is exempt; the agency must release any "reasonably segregable," non-exempt portion of a record. 5 U.S.C. § 552(b); *see also Manna II*, 832 F. Supp. at 870.

II. The IRS's Search for Responsive Documents Was Adequate

In their administrative appeal, Plaintiffs contended that the IRS's search for responsive documents was inadequate because the IRS produced no documents from any IRS Service Center or Federal Records Center. The Appeals Office concluded, and the Keys Declaration reasserts, that all responsive documents were located in the respective files of Williams and Rennert in the IRS's civil collection and criminal investigation field offices. Plaintiffs do not appear to raise this issue in their response to Defendants' motion for summary judgment. To the extent that Plaintiffs still challenge the adequacy of the IRS's search, however, this Court concludes that the search was more than adequate. When faced with a FOIA request, an agency must conduct a search "reasonably calculated to uncover all relevant documents," and may demonstrate the adequacy of its search "by means of reasonably detailed, nonconclusory

affidavits submitted in good faith." *Manna II*, 832 F. Supp. at 874-75.

In their Declarations, Reidy, Peterson, and Keys describe the IRS's search process. They attest that all relevant documents were in the field office files and that, at the time of the FOIA request, no responsive documents were at an IRS Service Center or Federal Records Center. (Reidy Decl. at Pars. 6, 13; Peterson Decl. at Par. 8; Keys Decl. at Par. 9.) This Court finds that the Declarations adequately demonstrate the reasonableness of the IRS's search and were made in good faith. Plaintiffs offer no evidence to the contrary regarding the IRS's search or the good faith basis of the agency's representations. *See SafeCard Servs., Inc. v. SEC.*, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1200 (D.C. Cir. 1991) ("Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" (quoting *Ground Saucer Watch, Inc. v. CIA*, 224 U.S. App. D.C. 1, 692 F.2d 770, 771 (D.C. Cir. 1981))).

III. This Court Will Not Require *In Camera* Review of the Withheld Documents

FOIA authorizes a court to examine withheld documents *in camera* to determine whether the documents should be disclosed. 5 U.S.C. § 552(a)(4)(B). However, such review is generally disfavored and should be undertaken only when the affidavits or the *Vaughn* index are insufficient. *Manna II*, 832 F. Supp. at 874; *see also Int'l Collision Specialists, Inc. v. IRS*, No. 93-2500, 1994 U.S. Dist. LEXIS 3032, 1994 WL 395310, at *3 (D.N.J. Mar. 4, 1994). "It is neither

consistent with the FOIA nor a wise use of judicial resources to rely on *in camera* review of documents as the principal tool for review of segregability disputes." *Pa. Dep't of Pub. Welfare v. United States*, Civil Action No. 05-1285, 2006 U.S. Dist. LEXIS 92807, 2006 WL 3792628, at * 16 (W.D. Pa. Dec. 21, 2006) (adopting Magistrate Judge's Report and Recommendation) (citing *Vaughn*, 484 F.2d at 825-26). Where the "affidavits demonstrate with reasonable specificity why the documents are exempt" and there is no evidence of bad faith, the court in its discretion may choose not to require *in camera* review. *Manna II*, 832 F. Supp. at 874; *see also Int'l Collision*, 1994 U.S. Dist. LEXIS 3032, 1994 WL 395310, at *3.

This Court is satisfied with the detail and specificity of the IRS's affidavits and the *Vaughn* Index, and will resolve this motion without resort to *in camera* review. *See Rugiero*, 257 F.3d at 544 ("Unless evidence contradicts the government's affidavits or establishes bad faith, the court's primary role is to review the adequacy of the affidavits and other evidence."). Plaintiffs have presented no evidence of bad faith on the IRS's part and have not overcome the presumption of good faith given to Defendants' affidavits. *See id.* ("Ordinarily, the agency may justify its claims of exemption through detailed affidavits, which are entitled to a presumption of good faith." (citing *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991))). If anything, the IRS's repeated "re-reviews" and disclosure of additional information at each stage of Plaintiffs' request, both at the administrative level and during the pendency of this litigation, suggests that the IRS has acted reasonably and in good faith in responding to Plaintiffs'

request. As discussed in greater detail below, the IRS's affidavits are sufficiently detailed regarding the nature of the withheld documents and the asserted basis for withholding that *in camera* review is unnecessary.

IV. The IRS Properly Withheld Documents Pursuant to FOIA Exemption 3

Under FOIA Exemption 3, an agency can withhold documents where they are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). A statute qualifies under this exemption if it "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.* Defendants assert Exemption 3 with respect to two statutes.

A. I.R.C. § 6103

Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103, has long been held to be a qualifying statute under Exemption 3. *See Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 11, 108 S. Ct. 271, 98 L. Ed. 2d 228 (1987); *see also Tax Analysts v. IRS*, 326 U.S. App. D.C. 53, 117 F.3d 607, 611 (D.C. Cir. 1997); *Grasso v. IRS*, 785 F.2d 70, 73-75 (3d Cir. 1986); *Carp v. IRS*, Civil Action No. 00-5992, 2002 U.S. Dist. LEXIS 2921, 2002 WL 373448, at *3 (D.N.J. Jan. 28, 2002); *Small v. IRS*, 820 F. Supp. 163, 166 (D.N.J. 1992). This statute, subject to certain exceptions not applicable here, prohibits the disclosure of third-party tax return information without the authorization of the third party. Section 6103 provides that "Returns and return

information shall be confidential, and except as authorized by this title . . . no officer or employee of the United States . . . shall disclose any return or return information." I.R.C. § 6103(a). The statute defines "return information" broadly as

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . . .

I.R.C. § 6103(b)(2)(A).

The IRS is withholding pages 362-63 in part and pages 2099-2104 in full from Berger's CI file. According to Keys's Declaration and the *Vaughn* Index, these pages comprise "Individual Return Program Transcript Information pertaining to third-party taxpayer." (Keys Decl. at Par. 13.) Plaintiffs concede that the documents in question are covered by § 6103 but contend that the IRS should segregate and withhold only information which could be associated with a third-party taxpayer, such as name, Social Security number, and address, and should disclose all non-identifying information from

these pages. However, the Supreme Court of the United States has held that § 6103 does not allow such redacting, because "Congress did not intend the statute to allow the disclosure of otherwise confidential return information merely by the redaction of identifying details." *Church of Scientology*, 484 U.S. at 16; *see also id.* at 18 ("[A]s with a return itself, removal of identification from return information would not deprive it of protection under § 6103(b)."). Thus, Plaintiffs' argument for segregation of the third-party tax information lacks merit.

In any event, the IRS appears to have segregated third-party return information where permissible and appropriate. Keys states with respect to pages 362-63 that "the *only* information withheld from disclosure are the names and social security numbers of third-party taxpayers." (Second Keys Decl. at Par. 8 (emphasis in original).) Pages 362-63, described as "Individual Master File transcript information, " appear to contain tax information which the IRS was able to segregate in accordance with the strictures of § 6103. (*Vaughn* Index at 23.) [6] On the other hand, pages 2099-2104 comprise a complete third-party tax return replete with identifying information and the kinds of information -- income, payments, etc. -- defined as "tax information" and barred from disclosure by § 6103. (Second Keys Decl. at Par. 9.) The IRS properly withheld 2 pages in full and 6 pages in part pursuant to Exemption 3 and § 6103.

B. 31 U.S.C. § 5319

The IRS initially withheld 1 page in full and 64 pages in part of the CI file pursuant to 31 U.S.C. § 5319 and

Exemption 3. These pages -- Pages 515-17, 547, 568-72, 578-79, 584-600, 820-25, 831, 1634-35, 1643, and 2038-64 - contain information regarding certain cash transactions made by Plaintiffs, including Currency and Banking Retrieval System ("CBRS") summary information and CBRS CTRs. Section 5319 provides that CTRs and other "report[s] and record[s] of reports" of transactions prepared pursuant to the Bank Secrecy Act (Title 31, Chapter 53, Subchapter II) "are exempt from disclosure under section 552 of title 5." 31 U.S.C. § 5319. Thus, Congress explicitly precluded disclosure of CTRs and similar reports ("Bank Secrecy Act reports") under § 5319 and expressly stated that covered reports would be exempt from disclosure under FOIA. Plaintiffs agree that § 5319 meets the criteria of Exemption 3 because it mandates withholding in such a manner as to leave no discretion on the issue to the agency. The few courts to address the issue have reached the natural conclusion that § 5319 qualifies as an exempting statute under Exemption 3. *See Small*, 820 F. Supp. at 166 (describing reports exempt from FOIA disclosure pursuant to § 5319 as "financial institution reports and records of reports of transactions involving the payment, receipt or transfer of United States coins and currency"); *see also Sciba v. Bd. of Governors of Fed. Reserve Sys.*, Civil Action No. 04-1011, 2005 U.S. Dist. LEXIS 6007, 2005 WL 3201206, at *3 (D.D.C. Nov. 4, 2005); *Linn v. U.S. Dep't of Justice*, Civil Action No. 92-1406, 1995 U.S. Dist. LEXIS 12935, 1995 WL 631847, at *30 (D.D.C. Aug. 22, 1995).

After considering Plaintiffs' response to Defendants' summary judgment motion and re-reviewing the withheld material, the IRS disclosed all or part of 22 pages which were initially withheld pursuant to § 5319.

The IRS determined that information in those 22 pages not derived or extracted directly from Bank Secrecy Act reports could be segregated from exempt information, and the IRS therefore disclosed portions of CI file pages 516-17, 547, 568-72, 578-79, 820-25, 831, 1634-35, 1643, and 2038-39. Defendants therefore have conceded Plaintiffs' argument that certain information not extracted from Bank Secrecy Act reports should be disclosed, and have in fact disclosed such information. The remaining information withheld pursuant to § 5319, the IRS asserts, constitutes Bank Secrecy Act forms or information derived or extracted from Bank Secrecy Act reports. (Second Keys Decl. at Pars. 14-22.) Based on its review of the Second Keys Declaration and the *Vaughn* Index, the Court accepts the IRS's representation.

This Court rejects Plaintiffs' other arguments for disclosure of information covered by § 5319. Plaintiffs contend that Exemption 3 does not cover CBRS information because, "in other contexts," the IRS has some discretion, based on the Internal Revenue Manual, to release CBRS information. (Pls.' Br. at 9.) This Court finds that CBRS reports qualify as reports under the Bank Secrecy Act that are exempt from disclosure under FOIA. Section 5319 provides that Bank Secrecy Act reports and records of reports are "exempt from disclosure under section 552 of title 5." 31 U.S.C. § 5319. This explicit statement of congressional intent to exempt reports such as CBRS reports outweighs the strained reading Plaintiffs offer based on the thin reed of an asserted section of the Internal Revenue Manual. [7] "The absolute language of section 5319 eliminates any possibility of agency discretion." *Linn*, 1995 U.S. Dist. LEXIS 12935, 1995 WL 631847, at

*30; *see also Sciba*, 2005 U.S. Dist. LEXIS 6007, 2005 WL 3201206, at *6 ("A fair reading of section 5319 leads to the conclusion that it explicitly exempts financial institution reports from public disclosure under the FOIA."). Furthermore, a court in this District has held that CBRS information is covered by § 5319 and exempt from disclosure under FOIA Exemption 3. *See Small*, 820 F. Supp. at 166 (discussing "information from the . . . Currency and Banking Retrieval System" and holding that because § 5319 "explicitly restricts the release of this information, the IRS must withhold this information from [plaintiff] under FOIA"). This Court similarly concludes that the IRS properly withheld documents pursuant to Exemption 3 and § 5319.

C. Privacy Act

Plaintiffs also argue that even if the IRS properly withheld information pursuant to FOIA and § 5319, the Privacy Act nonetheless allows disclosure where the information concerns transactions by Plaintiff Berger himself. The Privacy Act provides that "[e]ach agency that maintains a system of records shall . . . (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him." 5 U.S.C. § 552a(d). Plaintiffs stress that the Privacy Act applies even if FOIA exempts disclosure, as the Privacy Act specifically states that "[n]o agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the

provisions of this section." 5 U.S.C. § 552a(t).

However, Plaintiffs ignore the exceptions to the Privacy Act. Section 552a(j)(2) authorizes an agency to promulgate rules to exempt any system of records from disclosure under § 552a(d) if the system of records is maintained by an agency which "performs as its principal function any activity pertaining to the enforcement of criminal laws" and "which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders . . . (B) information compiled for the purpose of a criminal investigation . . . or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws." 5 U.S.C. § 552a(j)(2). Section 552a(k)(2) similarly authorizes an agency to promulgate rules to exempt any system of records from disclosure under § 552a(d) if the system of records includes "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section." 5 U.S.C. § 552a(k)(2).

Pursuant to these explicit statutory exceptions to Privacy Act disclosure, the IRS has issued a rule exempting its system of records encompassing CTRs and other Bank Secrecy Act reports from disclosure under subsection (d) of the Privacy Act. Internal Revenue Service, Privacy Act of 1974, System of Records Notice, Treasury/IRS 46.050, 66 Fed. Reg. 63784, 63847 (Dec. 10, 2001). Thus, the IRS has elected, in its statutorily-granted rulemaking authority, to exempt from the Privacy Act the same records exempted from FOIA under Exemption 3 and § 5319. (Keys Decl. at Pars. 12-13.) The IRS properly withheld

Bank Secrecy Act report information under both FOIA and the Privacy Act.

V. The IRS Properly Withheld Documents Pursuant to FOIA Exemption 5

FOIA Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The IRS has invoked this exemption to withhold two copies (4 pages total) of an interagency letter from the United States Attorney for the District of New Jersey to the Special Agent in Charge, Criminal Investigations, Internal Revenue Service, regarding the grand jury investigation of Plaintiff Berger. (Keys Decl. at Par. 21; Second Keys Decl. at Par. 24.) The IRS claims that this information is protected by the governmental deliberative privilege and the attorney work product doctrine.

A. Governmental Deliberative Privilege

The Third Circuit and many other federal courts have recognized that Exemption 5 encompasses the governmental deliberative process privilege. *See, e.g., Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001); *Cuccaro v. Sec'y of Labor*, 770 F.2d 355, 357 (3d Cir. 1985); *Conoco, Inc. v. U.S. Dep't of Justice*, 687 F.2d 724, 727 (3d Cir. 1982); *see also Pa. Dep't of Pub. Welfare*, 2006 U.S. Dist. LEXIS 92807, 2006 WL 3792628, at *24; *Manna v. Dep't of Justice*, 815 F. Supp. 798, 814 (D.N.J. 1993) (Debevoise, J.) (*Manna I*), *aff'd*, *Manna III*. This privilege serves to "encourage candid

communications between subordinates and superiors" and "prevent the quality of agency decisionmaking from deteriorating as a result of public exposure." *Manna I*, 815 F. Supp. at 814. To come within the deliberative process privilege, a government document must be both "predecisional and deliberative." *Id.* at 815 (citation omitted). "A document is 'predecisional' when it is received by the decision maker on the subject of the decision prior to the time the decision is made," and "a document is 'deliberative' when it reflects the give-and-take of the consultative process.'" *Id.* (citation omitted). This "executive privilege" has been held to protect "advisory opinions and recommendations of government." *Cuccaro*, 770 F.2d at 357. "[M]aterials properly withheld from disclosure pursuant to Exemption 5 do not lose their exempt status *unless* the agency expressly incorporates the material in its final decision." *Id.* at 358 (emphasis in original).

According to the Keys Declaration, the letter withheld by the IRS based on Exemption 5 and the governmental deliberative process privilege "selectively present[s]" the factual basis for pursuing a grand jury investigation of Plaintiff Berger and "provides analysis and recommendations for use by the [Internal Revenue] Service and the DOJ [Department of Justice] in deciding whether to pursue prosecution." (Keys Decl. at Par. 22.) Thus, the IRS asserts that the letter was both deliberative and predecisional, as it informed the Department of Justice's ultimate decision not to prosecute Plaintiffs. The deliberative process privilege extends to "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated," and thus protects

the United States Attorney's letter withheld here. *See Klamath Water Users*, 532 U.S. at 8.

Plaintiffs claim that the letter is not predecisional, but rather postdecisional because the "DOJ never prosecuted Plaintiffs" and the letter merely "memorializes the U.S. Attorney's decision *not* to prosecute Plaintiffs." (Pls.' Br. at 12-13 (emphasis in original).) However, as the Government notes, the decision to prosecute criminal tax matters formally lies with the Tax Division of the Department of Justice and not with the United States Attorney. *See* 28 C.F.R. § 0.70. The two Keys Declarations demonstrate that the withheld letter contained the United States Attorney's analysis and recommendations to the IRS's Special Agent in Charge for Criminal Investigations, and as such preceded the determination of the Department of Justice not to prosecute. The letter, according to the IRS, "was written for purposes of making a determination as to whether to pursue a grand jury investigation and subsequent litigation against the plaintiffs." (Second Keys Decl. at Par. 24.) The DOJ's ultimate decision not to prosecute does not somehow waive the deliberative privilege. *See Cuccaro*, 770 F.2d at 358.

Plaintiffs also assert that because it cannot be determined sufficiently from Defendants' submissions whether the letter was predecisional or only "memorialize[d]" an already-made decision not to prosecute, *in camera* review is needed. The Court disagrees. The *Vaughn* Index and the Keys Declarations provide sufficient detail for this Court to conclude that the letter is protected by the deliberative process privilege and therefore exempt from disclosure

under FOIA Exemption 5.

B. Work Product

No matter the application of the deliberative process privilege, the letter is also protected from disclosure by the attorney work product doctrine. Exemption 5 incorporates the work product privilege. *See Klamath Water Users*, 532 U.S. at 8; *FTC v. Grolier Inc.*, 462 U.S. 19, 23-24, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983); *Manna I*, 815 F.Supp. at 814. "Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975). As is well established, the work product doctrine protects documents prepared in anticipation of litigation. *See, e.g., United States v. Rockwell Int'l*, 897 F.2d 1255, 1266 (3d Cir. 1990); *Manchester v. DEA*, 823 F. Supp. 1259, 1268 (E.D. Pa. 1993).

The letter withheld by the IRS was written by the United States Attorney for the District of New Jersey and, according to the Keys Declarations, prepared in anticipation of possible litigation against Plaintiff. (Keys Decl. at Par. 21; Second Keys Decl. at Par. 24-25.) As the Supreme Court has held, the work product doctrine protects "memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." *Sears*, 421 U.S. at 154. The withheld letter thus falls within the scope of the doctrine. Furthermore, "[t]he work-product privilege simply does not distinguish between factual and deliberative material" and therefore Exemption 5 protects work-

product documents "regardless of their status as 'factual' or 'deliberative.'" *Martin v. Office of Special Counsel, Merit Sys. Protection Bd.*, 260 U.S. App. D.C. 382, 819 F.2d 1181, 1187 (D.C. Cir. 1987); *see also Manchester*, 823 F. Supp. at 1269 (holding that court "is not required to conduct an *in camera* review in order to determine that factual information is not reasonably segregable from privileged work product information, when, as here, the affidavits and index satisfy the court that any factual information is incidental to, and bound with, privileged work product"); *Manna I*, 815 F. Supp. at 814 (stating that "factual work-product materials are immune from disclosure" under FOIA). Defendants have met their burden to show that the withheld letter was prepared in anticipation of litigation, and therefore is exempt from disclosure as work product as well as pursuant to the deliberative process privilege. The IRS properly withheld the document from Plaintiffs under Exemption 5.

VI. The IRS Properly Withheld Documents Pursuant to FOIA Exemption 7(C)

FOIA Exemption 7 precludes disclosure of information prepared for law enforcement purposes, subject to certain conditions. 5 U.S.C. § 552(b)(7) . With regard to certain documents withheld from Plaintiffs, the IRS asserts Exemption 7(C), which covers "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* Plaintiffs do not dispute that the IRS is a law enforcement agency with regard to the information Plaintiffs seek and that the

information was prepared for law enforcement purposes related to the civil and criminal investigations of Plaintiffs. This Court agrees, and finds that "[t]he IRS has the requisite law enforcement mandate and the affidavits presented in this case establish a rational nexus between enforcement of a federal law and the documents for which the exemption is claimed." *See Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir. 1987).

The IRS has withheld 21 pages in full and 357 pages in part pursuant to Exemption 7(C). [8] The IRS asserts that these documents contain references to "persons who are not targets of investigations but, instead, were merely mentioned in law enforcement files." (Keys Decl at Par 25.) Therefore, the documents were withheld to protect against disclosure of personal information of third parties. Plaintiffs assert that disclosure of the withheld documents would not constitute an unwarranted invasion of privacy. "In determining whether the privacy exemption of 7(C) is appropriately invoked, the court must engage in a *de novo* balancing test: weighing the public benefit which would result from disclosure against the privacy interest and the extent to which it is invaded." *Cuccaro*, 770 F.2d at 359; *see also Carp*, 2002 U.S. Dist. LEXIS 2921, 2002 WL 373448, at *5 (stating in FOIA case against IRS that in assessing withholding under Exemption 7(C), "a court must balance the public interest in the disclosure of third-party information with the privacy interest of those third parties"). This Court has recognized that "individuals associated with a criminal investigation, including suspects, witnesses, interviewees and investigators, possess a privacy interest cognizable under Exemption 7(C) in not having their names revealed in connection with disclosure of the fact and

subject matter of the investigation." *Manna II*, 832 F. Supp. at 877 (citing *Landano v. U.S. Dep't of Justice*, 956 F.2d 422, 426 (3d Cir. 1992), *vacated in part on other grounds by U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 113 S. Ct. 2014, 124 L. Ed. 2d 84 (1993)). Disclosure of the names of such individuals could "result in embarrassment and harassment." *Manna III*, 51 F.3d at 1166 (quoting *McDonnell v. United States*, 4 F.3d 1227, 1255 (3d Cir. 1993)).

Review of the Keys Declarations and the *Vaughn* Index indicates that documents from the TFRP and CI files which referenced third-parties were redacted by the IRS, where possible, to withhold only private third-party information. The IRS made redactions "only where disclosure would reveal the personal information of third parties and such disclosure would result in an unwarranted invasion of the third party's personal privacy." (Second Keys Decl. at P 29.) Thus, of the 378 pages over which the IRS has asserted Exemption 7(C), only 21 were withheld completely. The remaining 357 were redacted to the extent necessary to protect third-party privacy and were disclosed to Plaintiffs in part.

Plaintiffs contend that some of the completely withheld or partially withheld documents "do not appear to concern third-parties at all and instead appear to *only* concern the Plaintiffs." (Pls.' Br. at 18 (emphasis in original).) However, even if a document "concerns" only Plaintiffs, any third-party information nonetheless contained in that document would be properly withheld pursuant to Exemption 7(C). The "names and addresses of private individuals which appear in the investigative files of government agencies are generally exempt from

disclosure unless that information is necessary to confirm or refute compelling evidence of agency misconduct." *Carp*, 2002 U.S. Dist. LEXIS 2921, 2002 WL 373448, at *5 (citing *SafeCard*, 926 F.2d at 1206). Plaintiffs do not allege any agency misconduct justifying disclosure of such private third-party information.

This Court accepts the IRS's good faith representation, supported by the record, that "the redactions made were limited in scope and confined to the personal information of third parties (primarily their names, addresses, telephone numbers, and social security numbers), and that this is evident when the redacted part is viewed in the context of the information released." (Second Keys Decl. at Par. 30.) After careful review of the *Vaughn* Index, this Court concludes that the IRS properly redacted certain documents, including records that primarily "concern" Plaintiffs, to avoid disclosure of private third-party information such as addresses and Social Security numbers. "If the Government fairly describes the content of the material withheld and adequately states its grounds for nondisclosure, and if those grounds are reasonable and consistent with the applicable law, the district court should uphold the government's position." *Rugiero*, 257 F.3d at 544. Defendants have met their burden that such redactions and other withholding serve to prevent an unwarranted invasion of privacy. Furthermore, any public interest in disclosure does not outweigh the privacy interests involved. The public interest in disclosure here is minimal; the primary value of disclosure is to Plaintiffs, not the public at large.

Plaintiffs also argue that disclosure of documents

concerning solely Plaintiffs is required under the Privacy Act. However, just as with Bank Secrecy Act report information, the IRS has exempted law enforcement records from disclosure under the Privacy Act pursuant to 5 U.S.C. §§ 552a(j)(2) and (k)(2). Internal Revenue Service, Privacy Act of 1974, System of Records Notice, Treasury/IRS 42.001, 66 Fed. Reg. 63784, 63835-36 (Dec. 10, 2001); *id.*, Treasury/IRS 42.008, 66 Fed. Reg. 63784, 63836; *id.*, Treasury/IRS 46.002, 66 Fed. Reg. 63784, 63842-43. Thus, the IRS properly withheld these law enforcement documents pursuant to the Privacy Act.

Next, Plaintiffs argue that because the IRS provided to Plaintiffs a list of third parties that the agency contacted during its investigations of Plaintiffs, withholding of documents regarding such third party contacts would not result in an unwarranted further invasion of privacy. However, review of the record indicates that the third-party contact list provided to Plaintiffs appears to include only the names of the third-party contacts, and not other identifying or personal information. (Keys Decl. at Par. 32.) Thus, further redaction by the IRS of documents to withhold such identifying information was appropriate. For example, Plaintiffs challenge the withholding in part of CI file pages 377-79, which contain a "[c]opy of a third-party witness's business card information and Memorandum of Contact dated March 1, 2004 wherein witness submitted to an interview with Special Agents involved in the criminal investigation of plaintiff." (*Vaughn* Index at 30.) While IRS rules appear to allow for disclosure of the names of third-party contacts, further disclosure of identifying information such as would be found on a witness's business card would

invade personal privacy such that withholding was appropriate.

With regard to some documents, Plaintiffs assert that the documents were not compiled for law enforcement purposes but for the IRS's "general monitoring of private individual's activities." (Pls.' Br. at 19.) The Third Circuit, following the D.C. Circuit, has indeed held that to qualify as "compiled for law enforcement purposes," documents must have been prepared by the agency "act[ing] within its principal function of law enforcement, rather than merely engaging in a general monitoring of private individuals' activities." *Davin*, 60 F.3d at 1054 (quoting *Pratt v. Webster*, 218 U.S. App. D.C. 17, 673 F.2d 408, 420 (D.C. Cir. 1982)). However, even if the withheld information was in documents which "appear to be the type of records which are routinely generated by the IRS without regard to whether a taxpayer has committed any civil or criminal violation (*i.e.*, as part of the IRS' tax collection function)" (Pls.' Br. at 19-20), they still were compiled by the IRS in its law enforcement capacity for purposes of investigating Plaintiffs. The Keys Declarations and the *Vaughn* Index repeatedly assert this reason for compiling the information, and sufficiently link the compilation of the records with the investigations of Plaintiffs. *See Davin*, 60 F.3d at 1056-57.

In any event, many of the documents cited by Plaintiffs as involving "general monitoring" in fact expressly stem from law enforcement. For example, Plaintiffs challenge the withholding of CI file pages 75, 78, and 81, which contain "Integrated Collection System (ICS) history transcript information collected with respect to Realty Research Corporation." (*Vaughn* Index at 7.) In

arguing that this information is "routinely generated," Plaintiffs appear to rely on the IRS's description of the ICS in the *Vaughn* Index as "one of two computer systems maintained by the [IRS] specifically dedicated to collection processing." (*Id.*) Yet the very next sentence in the description states that "ICS history transcripts document the [IRS]'s *criminal investigation activities* with respect to a taxpayer." (*Id.* (emphasis added).) Defendants have met their burden to establish that this information was compiled for law enforcement purposes, and that personal information of third parties was properly redacted. Other documents not directly related to law enforcement investigations, such as CI file pages 352 and 353 -- "Auto Track database information" which contained addresses and social security numbers of third parties -- were nonetheless generated and compiled to aid in the investigation of Plaintiffs, and therefore constitute information "compiled for law enforcement purposes." (*Vaughn* Index at 17-20.)

Plaintiffs also contend that some withheld documents "do not appear to involve any privacy interest" at all. (Pls.' Br. at 20.) Inspection of the IRS's Declarations and the *Vaughn* Index belies Plaintiffs' contentions. Records such as the "Auto Track database information," cited by Plaintiffs in this regard, were redacted by the IRS solely to remove personal identifying information of third parties, such as home addresses, cell phone numbers, and social security numbers. (*See, e.g.*, *Vaughn* Index at 17, 19, 21.) To take another example, Plaintiffs challenge the withholding in part of CI file page 373, which consists of an "Express mail envelope." (*Vaughn* Index at 26.) According to the *Vaughn* Index, this page contained, as one might expect to see on an

express mail envelope, "[p]ersonal contact information of addressee." (*Id.*) Such personal identifying information of a third party may be withheld by the IRS under Exemption 7(C), and the third party's interest in keeping the address private outweighs the limited public interest in disclosure. Similarly, Plaintiffs challenge the withholding in full of a printout from "Drivers of the Nation," CI file page 1173, as not implicating privacy interests. (*Vaughn* Index at 73.) The Government describes this page as containing "personal information of a third party including the third party's address, age, SSN, Driver License Number, State in which the License was issued and when the license expires." (*Id.*) Plaintiffs simply cannot be heard to argue that such information is not of the "type . . . which would trigger any reasonable expectation of privacy on the part of the individuals to whom the documents pertain." (Pls.' Br. at 20.)

Finally, Plaintiffs argue that *in camera* review of the documents withheld pursuant to Exemption 7(C) is required. This Court disagrees. The Court finds that the Keys Declarations and the *Vaughn* Index are sufficiently specific such that *in camera* review is not required to "rule out the possibility that disclosable information is being withheld from Plaintiffs." (Pls.' Br. at 21.) Defendants' submissions "demonstrate with reasonable specificity why the documents are exempt," the IRS's claim of exemption "is not contradicted in the record," and the Court finds "no evidence of bad faith on the part of the agency." *Manna II*, 832 F. Supp. at 874. The IRS's repeated reviews and disclosures of additional information in response to Plaintiffs' arguments at the administrative level and here demonstrate the agency's good faith, and Plaintiffs

have pointed to no evidence of bad faith. Thus, *in camera* review is not warranted.

VII. The IRS Properly Withheld Williams's Time Records Pursuant to Exemption 6

Finally, Plaintiffs challenge the IRS's withholding of time records prepared by Revenue Officer Williams, approximately 711 pages, during the period in which she handled the civil TFRP investigation of Plaintiffs. FOIA Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Here, Defendants assert that Williams has a personal privacy interest in her time sheets, as they include the time she spent "investigating taxpayers other than plaintiffs," and also any time she reported "as sick leave, vacation time, training, and for other administrative purposes." (Second Keys Decl. at Par. 37.)

Courts use roughly the same balancing test applied under Exemption 7(C), weighing the public interest against the privacy interest, to determine whether an agency has properly asserted Exemption 6. *See, e.g., Dep't of Air Force v. Rose*, 425 U.S. 352, 372-73, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976). Exemption 6 is not a "blanket exemption" for personnel files, *id.* at 371, and the exemption is narrower than that provided by Exemption 7(C) because Exemption 6 requires a "*clearly* unwarranted" invasion of privacy, *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989); *Sheet Metal Workers' Int'l Ass'n, Local Union No. 19 v. U.S. Dep't of Veterans Affairs*, 135 F.3d 891,

898 (3d Cir. 1998). The public interest to be considered in the balancing test under Exemption 6 is "the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *Sheet Metal Workers' Int'l*, 135 F.3d at 903 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994)).

Based on the Keys Declarations and the *Vaughn* Index, this Court finds that disclosure of Williams's time sheets, which are "similar" to personnel files, would constitute a clearly unwarranted invasion of her personal privacy. [9] Plaintiffs argue that there is a public interest in the disclosure of Williams's time records to "shed light on the operations of the IRS in conducting investigations of taxpayers." (Pls.' Br. at 30.) As Plaintiffs argue, "the public has an interest in whether public servants carry out their duties in an efficient and law-abiding manner." *Columbia Packing Co. v. U.S. Dep't of Agric.*, 563 F.2d 495, 499 (1st Cir. 1977). However, disclosure of Williams's time sheets would do little to serve such an interest, and certainly would not "contribute[] *significantly* to public understanding of the operations or activities of the government." *Sheet Metal Workers' Int'l*, 135 F.3d at 903 (quoting *Fed. Labor Relations Auth.*, 510 U.S. at 495) (emphasis added). Instead, disclosure would primarily serve Plaintiffs' particular private interests as individual taxpayers. Disclosure would not be "instrumental in shedding light on the operations of government." *Lewis v. U.S. Envt'l Protection Agency*, Civil Action No. 06-2669, 2006 U.S. Dist. LEXIS 80936, 2006 WL 3227787, at *6 (E.D. Pa. Nov. 3, 2006) (citing *Sheet Metal*

Workers' Int'l, 135 F.3d at 903). The fact that Williams is a public employee does not so lessen her expectation of privacy that disclosure of her time sheets would be appropriate, and her privacy interest outweighs the relatively minimal public interest in the manner in which Williams spent her time during the investigation of Plaintiffs.

Plaintiffs also argue that because the time sheets were "created as a result of Williams's investigation of Plaintiffs and therefore pertain to Plaintiffs," they should have been disclosed under the Privacy Act. However, the time sheets were created not as a result of the investigation of Plaintiffs *per se*, but pursuant to her conditions of employment with the IRS and concerned all of Williams's job functions, not just those pertaining to the investigation of Plaintiffs. Williams's time sheets certainly do not constitute "records about the Plaintiffs," and may not be disclosed under the Privacy Act without Williams's consent.

Finally, Plaintiffs argue that Williams's records could be segregated or redacted such that personal information could be removed and only time information regarding Williams's work on the investigation of Plaintiffs would be disclosed. Plaintiffs rely on *Vosburgh v. IRS*, a case where the IRS appears to have disclosed redacted versions of an IRS employee time sheet such that personal information was removed. Civil Action No. 93-1493, 1994 U.S. Dist. LEXIS 9956, 1994 WL 564699 (D. Or. July 5, 1994). The court in *Vosburgh* stated that the IRS "claims Exemption 6 as the basis for withholding certain information in Special Agent Welch's time records such as the names of third parties, the amount of time spent by the Special

Agent on the investigation of such parties, and the Special Agent's Social Security Number ("SSN")." *Id.* 1994 U.S. Dist. LEXIS 9956, [WL] at *3. Plaintiffs argue for the same redaction approach here.

However, the *Vosburgh* court concluded simply that "Exemption 6 therefore exempts Special Agent Welch's time records from disclosure." *Id.* Even though the court discussed third-party information, its holding was not so limited. Moreover, even if the IRS might have chosen to disclose time records in this one case, such disclosure fails to demonstrate that disclosure of redacted personal time records would *per se* not constitute a clearly unwarranted invasion of personal privacy. In addition, considering the extensive amount of personal information contained in the time sheets at issue here, Williams's time sheets may not be reasonably segregated such that only information which would not clearly invade Williams's personal privacy would be disclosed. *See* 5 U.S.C. § 552(b) ("Any *reasonably segregable portion* of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.") (emphasis added).

This Court nonetheless agrees with the *Vosburgh* court's holding that disclosure of information in time records "could have detrimental effects on the public interest involved by exposing the agent to unwarranted harassment." *Id.* This Court concludes that the public interest in disclosing the time records, either in total or only the redacted records concerning time spent on the investigation of Plaintiffs and absent any of Williams's personal information, is outweighed by Williams's personal privacy interest in her time records -- records

which were not created as part of the investigation, but rather in the normal course of her employment.

The Supreme Court has held that "we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. Rather, '[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual.'" *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982) (quoting H.R. Rep. No. 1497, 1966 U.S.S.C.A.N. 2418, 2428). Williams's time sheets - personal records which apply to a particular individual - qualify as files covered under Exemption 6, and this Court determines that "release of the information would constitute a clearly unwarranted invasion of that person's privacy." *Id.* The IRS properly withheld Williams's time sheets in full pursuant to FOIA Exemption 6. [10]

VIII. This Court Will Dismiss Counts Three, Four, and Five of Plaintiffs' Complaint

Pursuant to the above analysis, this Court will grant Defendants' motion for summary judgment with respect to Count One (FOIA) and Count Two (Privacy Act) of Plaintiffs' Complaint. The remaining Counts of Plaintiffs' Complaint were brought under sections of the Internal Revenue Code that do not confer a private right of action. I.R.C. §§ 6103, 6203, 7602(c). Plaintiffs concede that these statutes do not allow them a private right of action, but argue that these statutes permit disclosure under FOIA. Because this Court will grant summary judgment to Defendants on Plaintiffs' FOIA claim, it therefore will also dismiss Counts Three, Four,

and Five.

Conclusion and Order

For the foregoing reasons, it is ORDERED that Defendants' motion for summary judgment (Docket No. 10) is hereby GRANTED in its entirety. Judgment is hereby ENTERED in favor of Defendants. The Clerk shall mark this case closed.

Dated: May 22, 2007

Newark, New Jersey

s/ Harold A. Ackerman

U.S.D.J.

Footnotes

[1] "The Internal Revenue Code . . . requires employers to withhold from their employees' paychecks funds representing the employees' personal income and Social Security taxes. Because employers must hold these funds in 'trust' for the United States, the taxes are commonly referred to as 'trust fund' taxes. Should employers fail to turn over the trust fund taxes, the IRS may collect a Trust Fund Recovery Penalty, equal to the sum of the unpaid taxes, directly from the officers or other persons within the company who are responsible for collecting the taxes." *Ruggiero v. United States*, 242 F.R.D. 437 , 2007 U.S. Dist. LEXIS 27532, 2007 WL 1119200, at *1 (N.D. Ill. 2007) (citations omitted).

[2] The FOIA exemptions are codified at 5 U.S.C. § 552(b). In this Opinion, the Court will generally refer to FOIA exemptions as "Exemption #." For example, the FOIA exemption codified at 5 U.S.C. § 552(b)(7)(C) will be referred to as "Exemption 7(C)."

[3] "[T]here is no requirement that an agency provide a 'search certificate' or a 'Vaughn' index on an initial request for documents. The requirement for detailed declarations and Vaughn indices is imposed in connection with a motion for summary judgment filed by a defendant in a civil action pending in court." *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000).

[4] A requestor may, after exhausting an agency's administrative FOIA process, bring an action in "the district court of the United States in the district in which the [requestor] resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia." 5 U.S.C. § 552(a)(4)(B). The district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.' *Id.* The Privacy Act also authorizes a private right of action for a requestor where the agency refuses to comply with an individual request and, as under FOIA, "the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him." 5 U.S.C. §§ 552a(g)(1)(B) and 552a(g)(3)(A).

[5] In her initial Declaration, Keys asserted that 69 pages were withheld in part under Exemption 3 and § 5319.

Specifically, Keys stated that Pages 820-31 of the CI file were withheld from Plaintiffs. (Keys Decl. at Par. 16.) However, after further review, Keys stated in her Second Declaration that five pages in this series, Pages 826-30, were in fact fully disclosed to Plaintiffs. (Second Keys Decl. at Par. 20.) Therefore, the IRS withheld 64 pages, not 69, from Plaintiffs under this Exemption at the time of the filing of the instant motion.

[6] Plaintiffs have submitted the *Vaughn* Index as Exhibits A through E to the Declaration of Frank Agostino. Plaintiffs helpfully divided the *Vaughn* Index into five sections corresponding to each of the five grounds for exemption asserted by the IRS. In this Opinion and Order, this Court will cite to pages of the *Vaughn* Index directly, rather than to the pages' specific location in the exhibits to the Agostino Declaration.

[7] Plaintiffs cite an Internal Revenue Manual ("I.R.M.") provision which states, according to Plaintiffs, that with regard to the contents of a CBRS report, "the examiner may disclose to the examined entity that a currency report was or was not filed and the contents of the report if any." (Pls.' Br. at 9 (quoting Internal Revenue Manual § 4.26.4.9 (Jan. 1, 2003)).) Plaintiffs argue that under this asserted I.R.M. section, the IRS has some discretion to disclose CBRS information. Therefore, according to Plaintiffs, such information cannot be exempt under Exemption 3 because that exemption only covers statutes which provide that "matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3)(A).

Defendants do not address Plaintiffs' Internal Revenue

Manual argument. After its own search, the Court could not find the language quoted by Plaintiffs in the current version of I.R.M. § 4.26.4.9, effective November 17, 2006, or indeed anywhere else in the current version of the Internal Revenue Manual. Of course, the applicable Internal Revenue Manual would be the January 1, 2003 version in effect when Plaintiffs made their initial request. Even if the provision Plaintiffs quote was in effect at that time, this Court finds, for the reasons stated in this Opinion and Order, that CBRS reports qualify as reports exempt from disclosure under FOIA and § 5319.

Furthermore, while the current version of the Internal Revenue Manual is not directly applicable here, this Court's independent review of the current Internal Revenue Manual bolsters the Court's view that § 5319 covers this information. The current Internal Revenue Manual provides that "Examiners must not disclose CBRS information to the public." I.R.M. § 4.26.4.10 (Nov. 17, 2006). Another current Internal Revenue Manual provision states that "Form 8300 reports filed after December 31, 2001 and accessed through the Currency and Banking Retrieval System (CBRS) are Title 31 information subject to Bank Secrecy Act disclosure standards and are not subject to release under FOIA." I.R.M. § 11.3.13.7.6(4) (Jan. 1, 2006). Much of the information withheld by the IRS are Form 8300s or information derived from Form 8300s.

[8] The IRS has withheld TFRP file pages 45, 110, and 447 in part, and CI file pages 75, 78, 81, 339-42, 343-44, 346-48, 349-50, 352, 353, 354-55, 364-69, 373-83, 390-91, 393, 395, 400, 410-12, 414-16, 418-22, 429, 430-33, 436-37, 441-46, 452-53, 463-68, 475-76, 514, 522-23, 526, 535, 608,

622, 630-31, 634, 636-37, 649-56, 659-67, 786-819, 1173, 1245, 1247-50, 1252, 1254, 1259-60, 1292-1332, 1334-52, 1354-68, 1581, 1584-91, 1593-1605, 1802, 1804, 1810, 1813, 1931, 1942, 1951, 2029, 2030-31, 2032-33, 2070, 2304-24, 2326-43, 2345-80, 2383, 2385, 2387-97, 2399-2402, 2404-15, and 2417-22 in whole or in part.

[9] Plaintiffs attack the sufficiency of Keys's Declaration because she stated that disclosure "*could* reasonably be expected to constitute an unwarranted invasion of personal privacy." (Keys Decl. at Par. 31 (emphasis added).) As noted, the statutory standard for Exemption 6 states requires that disclosure "*would* constitute a *clearly* unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). While Keys indeed did not state the correct standard in this portion of her Declaration, she stated it correctly elsewhere in her Declarations (Keys Decl. at Par. 29; Second Keys Decl. at Pars. 35, 36.) Semantic differences aside, this Court is aware of the proper standard, and that Exemption 6 is narrower than Exemption 7(C). The Court has independently assessed Defendants' affidavits and the *Vaughn* Index and concludes Defendants have met their burden to show that disclosure of Williams's time sheets would constitute a clearly unwarranted invasion of personal privacy.

[10] Because withholding in full was proper pursuant to Exemption 6, this Court need not address the IRS's alternative argument that withholding in part would be proper pursuant to Exemption 3 in conjunction with I.R.C. § 6103(a) in that disclosing the time sheets would impermissibly disclose the return information of third-party taxpayers examined by Williams during the relevant period.

Dated 10/14/2008
No. 07-2796
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LAWRENCE S. BERGER; REALTY RESEARCH CORPORATION, Appellants
v.
INTERNAL REVENUE SERVICE; DEPARTMENT OF THE TREASURY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. (D.C. Civil No. 05-cv-03854). District Judge: The Honorable Harold A. Ackerman.

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and ROTH,* Circuit Judges

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in this decision having asked for rehearing, the petition for rehearing is DENIED.

Footnote

* Judge Roth's vote is limited to panel rehearing only.

129

(2)

FILED
MAY 15 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-884

In the Supreme Court of the United States

LAWRENCE S. BERGER, ET AL., PETITIONERS

v.

INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN DICICCO
Acting Assistant Attorney General
JONATHAN S. COHEN
GRETCHEN M. WOLFINGER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a court of appeals must review *de novo* a district court's grant of summary judgment on a claim arising under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

2. Whether the court of appeals correctly determined that the employee time sheets of an Internal Revenue Service (IRS) revenue officer are exempt from disclosure under FOIA Exemption 6, 5 U.S.C. 552(b)(6).

3. Whether the court of appeals correctly determined that the employee time sheets of an IRS revenue officer are Privacy Act records pertaining to the revenue officer, rather than the subjects of her investigatory work, which may not be disclosed without the consent of the revenue officer.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Abdelfattah v. *Department of Homeland Sec.*, 488 F.3d 178 (3d Cir. 2007) 5

Department of Defense v. *FLRA*, 510 U.S. 487 (1994) 3, 9, 10

Department of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 8, 10

Department of State v. *Washington Post Co.*, 456 U.S. 595 (1982) 8

Department of the Air Force v. *Rose*, 425 U.S. 352 (1976) 8

Lame v. *Department of Justice*, 767 F.2d 66 (3d Cir. 1985) 5, 6

Missouri ex rel. Garstang v. *Department of the Interior*, 297 F.3d 745 (8th Cir. 2002) 5

National Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 8, 9

Sheet Metal Workers Int'l Ass'n v. *Department of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) 3, 6

Voelker v. *IRS*, 646 F.2d 332 (8th Cir. 1981) 12, 13

Statutes: Page

Freedom of Information Act, 5 U.S.C. 552 1
5 U.S.C. 552(b)(3) 2
5 U.S.C. 552(b)(6) 2, 8, 9
Privacy Act, 5 U.S.C. 552a 1
5 U.S.C. 552a(a)(2) 4
5 U.S.C. 552a(b) 4, 11
5 U.S.C. 552a(d)(1) 4, 11, 13
5 U.S.C. 552a(k)(2) 14
26 U.S.C. 6103 11
26 U.S.C. 6672 2

In the Supreme Court of the United States

No. 08-884

LAWRENCE S. BERGER, ET AL., PETITIONERS

v.

INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the *Federal Reporter* but is reprinted in 288 Fed. Appx. 829. The opinion of the district court (Pet. App. 11a-52a) is reported at 487 F. Supp. 2d 482.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2008. A petition for rehearing was denied on October 14, 2008 (Pet. App. 53a). The petition for certiorari was filed on January 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This Freedom of Information Act (FOIA), 5 U.S.C. 552, and Privacy Act, 5 U.S.C. 552a, lawsuit arises from a civil tax investigation conducted by the Inter-

nal Revenue Service (IRS). IRS Revenue Officer Mary Williams was assigned to that investigation, which focused on whether petitioners had appropriately withheld federal taxes from employees' paychecks. Cf. 26 U.S.C. 6672. No action was taken against petitioners as a result of the investigation. Pet. App. 2a, 12a & n.1, 48a n.1.

In December 2003, petitioners submitted a FOIA and Privacy Act request to the IRS, seeking documents associated with the investigation, including Officer Williams' employee time records. The IRS released numerous documents in response to petitioners' request, but it withheld the time records and certain other responsive documents no longer at issue in this case. Pet. App. 2a-3a, 12a-15a.

2. In August 2005, petitioners filed the present suit in district court seeking the disclosure of documents withheld by the IRS. Respondents moved for summary judgment, arguing, as is relevant here, that Williams' employee time records were exempt from disclosure under FOIA Exemptions 3 and 6, 5 U.S.C. 552(b)(3) and (6), and that petitioners were not entitled to receive Williams' time records under the Privacy Act.

On May 22, 2007, the district court granted summary judgment to respondents. Pet. App. 11a-52a. The court held, *inter alia*, that Williams' time records were properly withheld in full under Exemption 6. *Id.* at 43a-45a; cf. *id.* at 47a n.10, 52a n.10 (finding it unnecessary to address Exemption 3). The court explained that disclosure "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6), because Williams' "privacy interest outweighs the relatively minimal public interest in the manner in which Williams spent her time during the investigation." Pet. App. 43a, 45a. The court noted that "disclosure would primarily serve [petition-

ers'] particular private interests" and would not meaningfully advance the public's understanding of the government's operations or activities. *Id.* at 44a. The court further held that the time sheets could not "be disclosed under the Privacy Act without Williams'[] consent" because they reflected time Williams spent on "all of [her] job functions," were created as part of her "conditions of employment with the IRS," and "do not constitute 'records about [petitioners].'" *Id.* at 45a.

3. The court of appeals affirmed in an unpublished, non-precedential opinion. Pet. App. 1a-10a. The court of appeals held that, based on its "balance [of] the public interest in disclosure against the privacy interest" at stake, FOIA Exemption 6 exempted Williams' employee time records from mandatory disclosure. *Id.* at 5a-7a. The court reasoned that "Williams has a privacy interest in her records as a whole because they are a personal recording of how she spent her time at work." *Id.* at 6a. On the other side of the balance, the court concluded that public disclosure of the time sheets "would not 'contribute significantly' to the public understanding of the operations of the IRS or 'appreciably further the citizens[']' right to be informed about what their government is up to.'" *Id.* at 7a (quoting *Sheet Metal Workers Int'l Ass'n* v. *Department of Veterans Affairs*, 135 F.3d 891, 900 (3d Cir. 1998), and *Department of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994) (*DoD*)). "Indeed, disclosure of her records would only serve [petitioners'] narrow interest in knowing how she investigated their particular case." *Ibid.* The court accordingly held that, even if "Williams'[] privacy interest" in her time sheets were "slight," that interest "outweighs th[e] weak public interest in * * * disclosure." *Ibid.*

The court of appeals further held that disclosure was inappropriate under the Privacy Act. Pet. App. 7a-8a. The court explained that the Privacy Act permits an individual to request access to his records or "any information pertaining to him" contained in a system of records in which such information is retrieved by the individual's name or other identifier, and that the Privacy Act normally prohibits disclosure of such records "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." *Id.* at 8a (quoting 5 U.S.C. 552a(b) and (d)(1)). Those provisions, the court concluded, prohibited disclosure of Officer Williams' time sheets to petitioner Lawrence Berger.[1] It explained that the "records were created pursuant to the conditions of [Williams'] employment, not * * * 'in connection with' her investigation of [petitioners]"; they document "the time Williams spent performing her job duties," which extend far beyond her investigation of petitioners; and they include such matters as Williams' "vacation time and sick leave." *Ibid.* The court accordingly held that "the time records pertain to Williams, not Berger, and cannot, absent the consent of Williams, be released under the Privacy Act." *Ibid.*

ARGUMENT

The unpublished, non-precedential decision of the court of appeals is correct and does not conflict with the decisions of this Court or any other court of appeals.

---

[1] Because the Privacy Act permits an "individual" to have access to his own records, 5 U.S.C. 552a(a)(2) and (d)(1), the Privacy Act claim for Williams' time sheets is pressed only on behalf of petitioner Berger and not petitioner Realty Research Corporation. Pet. 31 n.9; cf. Pet. App. 8a n.4, 10a n.4.

Although the court's decision articulates a standard of appellate review for factual determinations in FOIA cases that is the subject of a division of authority among the courts of appeals, that language did not influence the court's own evaluation of the balance of interests under FOIA Exemption 6. The court's resolution of that legal question, like its resolution of petitioner's Privacy Act claim, is correct and raises no issue meriting certiorari. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 5-18) that this Court should grant review to resolve a conflict among the courts of appeals regarding the proper standard of appellate review for FOIA cases decided at summary judgment. The court of appeals described the prevailing standard in the Third Circuit for reviewing factual determinations in the FOIA context, namely, that a district court's factual finding is reviewed to ensure that it has an "adequate factual basis" and is not "clearly erroneous." Pet. App. 4a-5a (citing *Abdelfattah* v. *Department of Homeland Sec.*, 488 F.3d 178, 182 (3d Cir. 2007) (per curiam), and *Lame* v. *Department of Justice*, 767 F.2d 66, 70 (3d Cir. 1985)). While other courts apply more traditional *de novo* review to all questions at summary judgment in FOIA cases, see, *e.g.*, *Missouri ex rel. Garstang* v. *Department of the Interior*, 297 F.3d 745, 749 & n.2 (8th Cir. 2002), the appropriate standard was irrelevant to the court of appeals' decision, which turned on its own Exemption 6 balancing of the public interest in disclosure against the privacy interest at stake. Further review is unwarranted because resolution of the proper appellate standard of review of factual issues would have no impact on this Court's disposition of this case.

Petitioners correctly concede that a court's Exemption 6 balancing is a question of law, Pet. 13-14, and that the Third Circuit itself conducts *de novo* review of such legal questions under FOIA. Pet. 11 (citing *Sheet Metal Workers Int'l Ass'n* v. *Department of Veterans Affairs*, 135 F.3d 891, 896 (3d Cir. 1998)). Nothing indicates that the court of appeals' unpublished, non-precedential decision in this case disregarded its own binding precedent in this regard. The court's standard-of-review discussion cites its prior decision in *Lame*, which makes clear that such legal questions are reviewed *de novo* and that the Third Circuit's standard for reviewing factual determinations applies when a district court makes factual findings based on an *in camera* review of the underlying documents. See *Lame*, 767 F.2d at 69-70. The court of appeals' Exemption 6 balancing likewise relies heavily on, and repeatedly cites, its earlier decision in *Sheet Metal Workers*, see Pet. App. 6a, which (as petitioners note) confirms that the Third Circuit conducts such balancing *de novo* on appeal. *Sheet Metal Workers*, 135 F.3d at 896-897, 902-905. Both parties also advised the court that non-factual determinations are reviewed *de novo*, Pet. C.A. Br. 3; Gov't C.A. Br. 15, and the court's decision reflects that it conducted its own Exemption 6 balancing afresh. See Pet. 6a-7a.

Moreover, the division of authority upon which petitioners rely concerns an issue that is not frequently dispositive in FOIA litigation. Most summary judgments under FOIA do not rest on a district court's factual findings resolving a genuine issue of material fact in favor of one litigant based on an *in camera* review of the underlying documents. This case is no different. The district court here concluded that the "general summary judgment standards appl[ied]" to its decision, that it would

be "inappropriate for [the] district court to resolve factual disputes," and that "[s]ummary judgment may be granted *only if*" there is "no genuine issue of material fact" in dispute. Pet. App. 18a-20a (emphasis added; citation omitted). The district court accordingly did not base its Exemption 6 analysis on findings concerning disputed facts. *Id.* at 43a-45a. Indeed, it would not have done so on the summary judgment record, which included declarations from IRS employees regarding the records at issue and a *Vaughn* index, see, *e.g.*, C.A. App. 208-319, 378-390, but did not contain the underlying records for the court's *in camera* review. See Pet. App. 22a-24a. Not only have petitioners failed to challenge in their petition—and have therefore abandoned—the district court's discretionary decision not to conduct an *in camera* review, cf. *id.* at 8a-9a, they also fail to identify any record evidence giving rise to a genuine issue of material fact concerning the Exemption 6 analysis conducted by the courts below. In short, the proper standard of appellate review for factual findings in FOIA cases had no bearing on the proper disposition of this case. That issue therefore does not merit further review in this case, especially since the decision below is unpublished and recited the standard of appellate review of factual issues only in passing.

2. Petitioners contend (Pet. 18-31) that the court of appeals erred in its FOIA analysis by according too much weight to Officer Williams' privacy interest in her daily time sheets under FOIA Exemption 6 and in concluding that her privacy interest outweighed the public interest in disclosure. Those contentions are without merit.

a. The court of appeals correctly concluded that Williams has a cognizable privacy interest in her time re-

cords. Although petitioners argue (Pet. 19-22) that "purely work-related information" cannot implicate personal privacy, that contention is inconsistent with the text of Exemption 6 and the decisions of this Court. This Court has repeatedly emphasized that FOIA's "concept of personal privacy" does not reflect a "limited or 'cramped notion' of that idea." See *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 165 (2004) (quoting *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) (*Reporters Comm.*)). Indeed, FOIA affords broad protection to a wide range of privacy interests that promote "the individual's control of information concerning his or her person," *Reporters Comm.*, 489 U.S. at 763-764, and that extend well beyond merely "intimate" or "highly personal" details, *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600 (1982) (citation omitted).

Exemption 6 by its terms applies to "*personnel* and medical files and similar files" the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6) (emphasis added). This Court has thus recognized that "[i]nformation such as * * * employment history[] and comparable data" may be exempt from disclosure under Exemption 6 even though such information "is not normally regarded as highly personal." *Washington Post Co.*, 456 U.S. at 600. The Court has likewise held that Exemption 6 contemplates redaction of purely work-related information in the form of case summaries of honor code violations by Air Force Academy cadets to protect the personal privacy of those government employees. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 376-377, 380-381 (1976).

Those decisions reflect the understanding that the privacy interest at stake must be analyzed in light of the fact that a FOIA release requires disclosure to the public generally, which "must have the same access under FOIA" as any particular requester. *Department of Defense* v. *FLRA*, 510 U.S. 487, 501 (1994); see *id.* at 496; *Favish*, 541 U.S. at 174. The public disclosure of an employee's time sheets detailing the specifics of her daily activities certainly implicates a non-trivial privacy interest. At the very least, an individual like Officer Williams has an interest in avoiding the potential harassment from disgruntled subjects of IRS investigations pursuing her employment records. And, while the court of appeals expressed the view that that privacy interest might be "slight," it nevertheless outweighs the relevant public interest in disclosing such records. Pet. App. 7a.

b. Petitioners argue (Pet. 23-28) that a "slight" privacy interest cannot justify withholding under Exemption 6 and that only a "significant" interest can be sufficient to establish a "clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6). That contention is meritless. The court of appeals not only applied Exemption 6's "clearly unwarranted" standard, Pet. App. 5a (quoting 5 U.S.C. 552(b)(6)); this Court itself has made clear that "a *very slight* privacy interest would suffice" under Exemption 6 when the public interest in disclosure is sufficiently small. *DoD*, 510 U.S. at 500 (emphasis added).

c. Petitioners thus ultimately challenge the Exemption 6 balance struck by the court of appeals by asserting that there is a "strong" public interest in disclosure of Williams' time sheets. Pet. 28-31. The court of appeals, however, correctly concluded that "disclosure of [Williams'] records would *only* serve [petitioners'] nar-

row interest in knowing how she investigated their particular case." Pet. App. 7a (emphasis added).

It is well settled that "the only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *DoD*, 510 U.S. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773) (brackets in original). A FOIA requester's own private interest in disclosure—like that at issue here—has "no bearing" in the relevant analysis. *Id.* at 496 ("identity of the requesting party" and the "purposes for which the request for information is made" are irrelevant) (quoting *Reporters Comm.*, 489 U.S. at 771). Instead, the disclosure must "appreciably further" public knowledge of the government's operations or otherwise open up agency action to the light of public scrutiny in a "meaningful way." *Id.* at 497-478 (citation omitted).

Disclosure of Williams' time sheets would serve no such public interest. Petitioners seek only those time entries relating to the petitioners' own tax investigation, Pet. 19, yet they claim that such a disclosure would "shed light on the manner in which the IRS conducts civil tax investigations," reveal whether IRS employees are "carry[ing] out their duties in an efficient and law-abiding manner," and show whether the "investigation [of petitioners] was comprehensive" and cost-effective. Pet. 29-30 (citations omitted). Employee time sheets detailing the "total hours [Williams] spent on the investigation"—even assuming those records generally reflect the "tasks she performed," Pet. 30—would not reveal anything meaningful to the public about the IRS generally or the investigation of petitioners specifically. To

make a meaningful assessment of that investigation, the public would need to have a more detailed understanding of what was investigated than might be reflected in daily time records. At the very least, the public would also need access to petitioners' relevant tax and other records at issue in the investigation in order to evaluate meaningfully Williams' performance and reasonably assess whether the investigation was comprehensive or cost-effective. Such taxpayer-specific materials, of course, are specifically protected from public disclosure by statute. See, *e.g.*, 26 U.S.C. 6103.

In the end, petitioners request this Court to review the court of appeals' Exemption 6 holding without identifying any decision of this Court or any other court of appeals with which that holding is in conflict. No further review of that holding is warranted.

3. Petitioners' Privacy Act contentions (Pet. 31-36) are equally unavailing. The court of appeals concluded that the Privacy Act did not permit petitioner Berger to obtain access to Williams' employee time records because those records pertained to Williams, not Berger. Pet. App. 7a-8a. That fact-bound determination presents no issue justifying this Court's review.

The Privacy Act generally provides that "[e]ach agency that maintains a system of records shall," upon "request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit [the individual] * * * to review the record." 5 U.S.C. 552a(d)(1). However, the Act further requires that, subject to exceptions not relevant here, "[n]o agency shall disclose any record which is contained in a system of records" without the written consent of "the individual to whom the record pertains." 5 U.S.C. 552a(b).

Petitioners do not contest that Williams' employee time records pertain to Williams. They instead suggest that the time sheets also pertain to Berger. Pet. 32-33, 34-35; see Pet. 31 n.9. The evidentiary record, however, does not support that contention. The time sheets themselves are not in the record, cf. Pet. App. 23a (declining to conduct *in camera* review), and the declaration that describes them states that the documents are Williams' "personal recording of the time [she] expended as [an IRS] employee over a particular period of time," including the time that she spent "examining various taxpayers" and the time she "reported as sick leave, vacation time, training, and for other administrative purposes." C.A. App. 388. Those records, the declaration adds, "were created as a result of and in accordance with her term of employment" and "are not records about [petitioner Berger]." *Id.* at 389. The court of appeals reviewed the summary judgment record *de novo* and, like the district court, concluded that the evidence showed that Williams' time records did not pertain to Berger. Pet. App. 8a, 45a.[2]

Relying on *Voelker* v. *IRS*, 646 F.2d 332 (8th Cir. 1981), petitioners argue that, "if a record concerns two people, the record may be retrieved [under the Privacy Act] by either person without the consent of the other." Pet. 35. The summary judgment record, however, does not show that Williams' time sheets actually pertain to petitioner Berger, and that factual shortcoming alone makes this case a poor vehicle to review petitioners' fact-bound contentions.

---

[2] The court of appeals based its ruling on a *de novo* review of the Privacy Act claim, applying the same summary judgment standard as the district court. Pet. App. 7a.

Moreover, even if Williams' time sheets included references to Berger, this Court's review would not be warranted because the court of appeals' decision does not conflict with *Voelker*. In *Voelker*, the IRS completed an investigation of Voelker and Voelker sought access to his investigatory record under the Privacy Act. 646 F.2d at 333. The IRS redacted those portions of the record that involved "personal information pertaining to a third party" because it reasoned that such information did not "pertain" to Voelker. *Ibid.* The court concluded that such redaction was improper because Section 552a(d)(1) "clearly states that an individual is entitled to *his record*" and, therefore, does not require that the individual "meet some separate 'pertaining to' standard" when seeking to access information in his own file. *Id.* at 334. *Voelker* thus holds that "information contained in a requesting individual's record" cannot be withheld "on the ground that the [particular] information does not pertain to that individual." *Ibid.* The records at issue here, in contrast, are Williams' time records, which document the time spent by Williams on various job-related matters. Even if a portion of those records refers to Berger, *Voelker* merely supports the proposition that Williams (not Berger) would be entitled to have access to all of her time records, even if portions mention other individuals. *Voelker* does not speak to the distinct question whether an individual referred in Williams' time records would also be entitled to access to those records.[3]

---

[3] Petitioners make two additional arguments, neither of which suggests that certiorari is warranted. First, petitioners contend (Pet. 33-34) that Williams' daily time sheets may be retrieved by Berger's name from an IRS "system of records" based on an assertion that the records are actually part of the "ENTITY Case Management System." Second,

The court of appeals' conclusion that Williams' time records do not pertain to petitioner is fact-bound, and petitioners identify no conflict of authority that would justify review of the court of appeals' unpublished, non-precedential decision. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN DICICCO
Acting Assistant Attorney General
JONATHAN S. COHEN
GRETCHEN M. WOLFINGER
Attorneys

MAY 2009

---

they argue (Pet. 35-36) that Williams' time sheets are not exempt from disclosure under Section 552a(k)(2). The government disputed those contentions, Gov't C.A. Br. 17-19, which petitioners raised for the first time on appeal, and the court of appeals found it unnecessary to resolve either question in light of its determination that the time sheets did not pertain to Berger. See Pet. App. 8a & n.5, 10a n.5.

Supreme Court, U.S.
FILED
JUN 4 - 2009
OFFICE OF THE CLERK

130

(3)

No. 08-884

IN THE

Supreme Court of the United States

LAWRENCE S. BERGER; REALTY RESEARCH CORPORATION, PETITIONERS

v.

INTERNAL REVENUE SERVICE; DEPARTMENT OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

DENNIS CALO
Counsel of Record

FRANK AGOSTINO
JAMES J. BONICOS

Calo Agostino, P.C.
The Bank House
14 Washington Place
Hackensack, NJ 07601
(201) 488-5400

Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141

TABLE OF CONTENTS

Page

ARGUMENT 1

I.Respondents wrongly suggest that certiorari should not be granted because the Third Circuit's opinion was unpublished and designated as "non-precedential." 1

II.There is no support for Respondents' argument that the Third Circuit reviewed Petitioners' FOIA claims *de novo*. 2

III.The text of Exemption 6 and the prior decisions of this court do not compel the conclusion that a public employee has a right of privacy in purely work-related records which touch upon no aspect of the employee's private life 4

IV. Respondents argument that a "slight" privacy interest is sufficient to shield a document from disclosure under Exemption 6 ignores the exemption's "clearly unwarranted" language. 6

V. Respondents erroneously contend that the public interest will not be advanced by the disclosure of the disputed time-records. 8

VI. Respondents' Privacy Act arguments are all without merit. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

ABDELFATTAH V. DEP'T OF HOMELAND SEC., 488 F.3D 178, 182(3D CIR. 207) 4
CITY OF CANTON, OHIO V. HARRIS, 489 U.S. 378 (1989) 2
DEP'T OF AIR FORCE V. ROSE, 425 U.S. 352, 377 (1976) 5, 6
DEP'T OF DEFENSE V. FLR A, 510 U.S. 487, 497 (1994) 5, 7, 8
DEP'T OF JUSTICE V. REPORTERS COMMITTEE FOR FREEDOM OF PRESS, 489 U.S. 749 (1989) 5, 6, 8, 9
DEP'T OF STATE V. RAY, 502 U.S. 164, 167-170 (1991) 5, 7
DEP'T OF STATE V. WASHINGTON POST CO., 456 U.S. 595, 598 (1992) 5, 7
DOE V. U.S., 487 U.S. 201 (1988) 2
HALPERN V. FBI, 181 F.3D 279, 287 (2D CIR. 1999) 4
HOUSTON V. LACK, 487 U.S. 266 (1988) 2
KOKKONEN V. GUARDIAN LIFE INS. CO. OF AMERICA, 511 U.S. 375 (1994) 2
LAME V. DEP'T OF JUSTICE, 767 F.2D 66, 70 (3D CIR. 1985) 3
NATIONAL ARCHIVES AND RECORDS ADMIN. V. FAVISH, 541 U.S. 157, 166 (2004) 5
PORTLAND GOLF CLUB V. C.I.R., 497 U.S. 154 (1990) 2
VOELKER V. IRS, 646 F.2D 332, 334 (8TH CIR. 1981) 10

RULES

Supreme Court Rule 10 1

ARGUMENT

I. Respondents wrongly suggest that certiorari should not be granted because the Third Circuit's opinion was unpublished and designated as "non-precedential."

At several points, Respondents' brief notes that the opinion for which certiorari is sought was unpublished and designated as "non-precedential." Br. 3, 4, 6, 7. Respondents' apparent purpose in bringing this to the Court's attention is to suggest that it weighs against granting certiorari. This argument is without merit for several reasons.

First, Supreme Court Rule 10, which sets forth the primary factors which should be considered in deciding whether to grant certiorari, does not state that an opinion's unpublished or non-precedential status is a factor in that decision. Rather, the rule merely requires, *inter alia*, that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter...." Sup. Ct. Rule 10(a). The Third Circuit's opinion meets that criteria because the standard of review it used to decide Petitioners' appeal under the Freedom of Information Act ("FOIA") conflicts with the standard used by other circuits.

Second, Rule 32.1 of the Federal Rules of Appellate Procedure does not allow the circuit courts to prohibit litigants from citing unpublished or "non-precedential" decisions issued on or after January 1, 2007. Fed. R. App. P. 32.1. Since the Third Circuit's opinion was issued on August 11, 2008, litigants will be permitted to cite it in future cases which this court has

a clear interest in preventing because the opinion contains an incorrect statement of the law.

Third, Respondents contend that the opinion reflects Third Circuit precedent regarding the standard of review applicable to FOIA appeals. Br. 6. As such, it is an appropriate vehicle for Petitioners to challenge that precedent.

Fourth, on numerous occasions this Court has granted certiorari to unpublished opinions. See *e.g.*, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Portland Golf Club v. C.I.R.*, 497 U.S. 154 (1990); *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Houston v. Lack*, 487 U.S. 266 (1988). The Court has even granted certiorari, as it is being asked to do here, to an unpublished opinion for the specific purpose of settling a conflict among the courts of appeals. *Doe v. U.S.*, 487 U.S. 201 (1988).

Given the foregoing, the fact that the underlying opinion was unpublished and designated as "non-precedential" should have no bearing on this Court's decision to grant or deny certiorari.

II. There is no support for Respondents' argument that the Third Circuit reviewed Petitioners' FOIA claims *de novo*.

Respondents concede that the two-tier standard of review articulated by the Third Circuit "is the subject of a division of authority among the courts of appeals." Br. 5. Of course, such a conflict would make this case a clear candidate for review by the Supreme Court. To avoid that result, Respondents claim that the Third Circuit did not use the two-tier standard to determine whether the district court properly applied FOIA Exemption 6 but instead used a *de novo*

standard. Br. 5. This assertion simply has no basis in the court's opinion.

Nowhere in the opinion did the Third Circuit state that a *de novo* standard applied to its review of the district court's application of Exemption 6. Rather, it **only** discussed the two-tier standard. Pet. 4a. Moreover, the court indicated that the standard applies generally to **all** appeals from summary judgment decisions in FOIA cases, regardless of the particular FOIA exemption involved. Pet. 4a. The court's use of the two-tier standard to determine whether the district court properly applied Exemption 6 would be consistent with its past pronouncement that the second prong of the standard requires it to determine "if the **conclusion of the trial court** is clearly erroneous." *Lame v. Dep't of Justice*, 767 F.2d 66, 70 (3d Cir. 1985)(emphasis added). In a FOIA case, the "conclusion of the trial court" which is usually reviewed on appeal is its determination whether documents are exempt from disclosure under the FOIA. The Third Circuit has acknowledged that it applies the two-tier standard to that issue. *Sheet Metal Workers*, 135 F.3d at 896 ("the two tiered standard of review of the district court's determination that a particular document is or is not properly subject to exemption does not, of course, preclude plenary review of issues of law.").

Respondents apparently believe that the Third Circuit could not have used the two-tier standard because they consider the Exemption 6 balancing test a question of law which should be reviewed *de novo*. Br. 6. This belief is unfounded because, although the Third Circuit has made off-hand pronouncements that questions of law should be reviewed *de novo* in FOIA appeals, neither the opinion for which review is sought nor the circuit's prior caselaw demonstrate that it

considers the balancing test a question of law. To the contrary, the fact that it only discussed the two-tier standard in this case suggests that it treats the issue as a question of fact.

Respondent also erroneously contends that the Third Circuit only uses the two-tier standard to evaluate a district court's "factual findings based on an *in camera* review of the underlying documents." Br. 6. That cannot be correct, because the district court in this case did not perform an *in camera* review (Pet. 22a) and yet the Third Circuit's opinion focused exclusively on the two-tier standard. Moreover, the court has previously applied that standard to cases which did not involve *in camera* review by the district court. *Abdelfattah v. Dep't of Homeland Sec.*, 488 F.3d 178, 182(3d Cir. 2007); *Sheet Metal Workers*, 135 F.3d at 896.

In sum, the Third Circuit's opinion plainly indicates that it reviewed Petitioners' FOIA claims using the two-tier standard. That approach is in direct conflict with those circuits which use a *de novo* standard. See *e.g.*, *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999). Therefore, Petitioners respectfully request that certiorari be granted to resolve this conflict.

III. The text of Exemption 6 and the prior decisions of this court do not compel the conclusion that a public employee has a right of privacy in purely work-related records which touch upon no aspect of the employee's private life.

Respondents contend that Exemption 6's reference to "personnel" files shows that it was intended to protect purely work-related documents.

Br. 7. This argument is dubious however, because an employee's personnel file also contains information which is not work-related but which only concerns the employee's private life or personal attributes. *Dep't of Air Force v. Rose*, 425 U.S. 352, 377 (1976)("these summaries.... do not contain the 'vast amounts of personal data,' ... ordinarily to be found in his personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance.").

Respondents also contend that the Supreme Court's past decisions establish that the exemption was meant to protect purely work-related documents. Br. 8. However, the cases cited by Respondents on this point do not support that conclusion because, unlike this case, the contested information in those cases concerned some aspect of the private life or personal attributes of the persons who were resisting disclosure. See *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 166 (2004); *Dep't of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749 (1989); *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 598 (1992); *Dep't of Defense v. FLR A*, 510 U.S. 487, 497 (1994); *Dep't of State v. Ray*, 502 U.S. 164, 167-170 (1991); *Rose*, 425 U.S. 352 supra.

Respondents' misleadingly claim, on the basis of *Dep't of Air Force v. Rose*, that "[t]he Court has likewise held that Exemption 6 contemplates redaction of purely work-related information in the form of case summaries of honor code violations by Air Force Academy cadets to protect the personal privacy of those government employees." Br. 8. That case does not support this conclusion because the case summaries at issue in *Rose* did not concern purely work-related

activities as do the time-records in this case. Instead, the summaries concerned violations of the Academy's honor code and therefore reflected upon the cadets' personal capacity for honesty and integrity. *Id.* at 358. In that manner, the summaries were more like the criminal "rap sheets" which were protected from disclosure in *Reporters Committee* than the time-records which are at issue in this case. *Reporters Committee*, 489 U.S. 749 supra.

Unlike the "rap sheets" and case summaries in the foregoing cases, the disputed time-records in this case would not be expected to contain information which would reveal any negative character trait, personal attribute or aspect of Williams' private life. If the records did, such information could be easily excised from the documents. For the most part, the records would simply be expected to reveal the time Williams spent and activities she performed with respect to her investigation of Petitioners. Petitioners respectfully contend that the release of such mundane information does not implicate the same level of privacy interests which were at stake in this Court's past decisions construing Exemption 6, and therefore certiorari should be granted to clarify the limits of the exemption.

IV. Respondents argument that a "slight" privacy interest is sufficient to shield a document from disclosure under Exemption 6 ignores the exemption's "clearly unwarranted" language.

Respondents contend that even a " very slight" privacy interest is enough in the face of a sufficiently small public interest to protect a document from disclosure under Exemption 6. Br. 9. The problem

with this argument is that it makes the balancing test required by Exemption 6 the functional equivalent of the balancing test required Exemption 7(C).

Because Exemption 6 requires a "clearly unwarranted" invasion of personal privacy and Exemption 7(C) only requires an "unwarranted" invasion of personal privacy, this Court has recognized that the former requires a greater showing of invasion of privacy than the latter. *Dep't of State v. Ray*, 502 U.S. at 172. This means that if, as Respondents contend, a "very slight" privacy interest is able to tip the balance in favor of non-disclosure under Exemption 6, then an even less significant privacy interest would be sufficient to tip the balance under Exemption 7(C). Since it is difficult to conceive of a lesser interest than a "very slight" interest, in practice, Respondents' approach would make the balancing tests under both exemptions essentially the same which conflicts with this Court's prior holding that Exemption 6 requires a greater showing. Respondents' approach also minimizes the significance of the "clearly unwarranted" language which is inconsistent with the Court's past recognition of the importance of that language as the primary means of holding Exemption 6's protection "within bounds." *Washington Post Co.*, 456 U.S. at 599-600.

Respondents' contention that *Dep't of Defense v. FLRA*, supports its argument on this point is unpersuasive because the Court's statement, relied on by Respondents, that "a very slight privacy interest would suffice to outweigh the relevant public interest," was merely *dicta*. 510 U.S. at 500. The Court actually found that the employees' privacy interest at stake in the case "in nondisclosure of their home addresses **substantially outweighs** the negligible FOIA-related

public interest in disclosure." *Id.* at 502 (emphasis added). Therefore, if anything, the decision supports Petitioners' argument that more than a *de minimus* privacy interest must be implicated for a document to be shielded from disclosure by Exemption 6.

V. Respondents erroneously contend that the public interest will not be advanced by the disclosure of the disputed time-records.

Respondents contend that the disclosure of the time-records will serve no public interest because the records of a single IRS employee will do little to advance the public understanding of the activities of the agency as a whole. Br. 10-11. This argument is flawed because it fails to recognize that the IRS does not conduct tax examinations in an *ad hoc* manner but instead does so pursuant to established agency procedures and protocol. See Internal Revenue Manual, Part 5 and Part 9. Therefore, the manner in which a single tax examination is performed may be deemed to be representative of all similar tax examinations. As such, the release of Williams' time-records will reveal information regarding tax examinations in general.

Since the time-records in this case were created by a federal employee in furtherance of a federal agency's official duties, they clearly reflect the internal operations of the government to a much greater extent than the records at issue in the cases cited by Respondents. *Reporters Committee*, 489 U.S. 749 (criminal records of a private citizen); *Dep't of Defense v. FLRA*, 510 U.S. at 497 (home addresses of agency employees). As such, the records will sufficiently "she[d] light on an agency's performance of its

statutory duties" to justify their release under Exemption 6. *Reporters Comm.*, 489 U.S. at 773.

VI. Respondents' Privacy Act arguments are all without merit.

Respondents raise essentially three arguments against Petitioners' contention that the time-records should have been released under the Privacy Act. All of these arguments are equally without merit.

First, Respondents contend that the evidentiary record does not show that the time-records pertain to Petitioner Berger. Br. 12. This however, is contradicted by the Third Circuit's opinion which noted that the time-records reflected, among other things, the time Williams spent "investigating other taxpayers **as well as appellants**..." (Pet. 8a)(emphasis added). The district court noted the same, stating that the time-records "concerned all of Williams' job functions, **not just those pertaining to the investigation of Plaintiffs**." (Pet. 45a)(emphasis added). To support its argument on this point, Respondents claim that the declaration submitted to the district court by the IRS which described the time-records did not admit that the records included information pertaining to Berger but merely reflected, among other things, the time Williams spent "examining various taxpayers." Br. 12. This argument is unpersuasive because the same declaration does not deny that Berger was one of the "various taxpayers" examined by Williams. C.A. App. 388. Moreover, if the time-records did not pertain to Berger, the IRS never would have collected the records in response to Petitioners' FOIA request which demanded records "pertaining to themselves and to the investigations of them..." Pet. 2a.

Respondents next imply that the Third Circuit concluded, as a factual matter, that the records did not pertain to Berger. Br. 12. It did not. Rather, the Third Circuit concluded, as a legal matter, that the time-records did not pertain to Berger because it considered the records to have been created "pursuant to the conditions of [Williams'] employment" and not in connection with her examination of Petitioners. Pet. 8a.

Lastly, Respondents contend that *Voelker v. IRS*, 646 F.2d 332, 334 (8th Cir. 1981) does not support the release of the records because "[e]ven if a portion [of the time-records] refers to Berger, *Voelker* merely supports the proposition that Williams (not Berger) would be entitled to have access to all of her time records, even if portions mention other individuals." Br. 13. The flaw with this argument is that it presumes that the time-records only pertain to Williams and therefore may be deemed "her" records. The *Voelker* decision does not support this position.

The plaintiff in *Voelker* was an IRS attorney who requested records pertaining to the agency's investigation of him. As here, the IRS refused to comply with the request based on its contention that the records pertained to a third-party and therefore the third-party's permission was required to release the records. *Id.* at 333. The Eighth Circuit rejected this argument, noting that "it defies logic to say that information properly contained in a person's record does not pertain to that person, even if it may also pertain to another individual." *Id.* at 334. The case therefore supports the proposition that, for purposes of the Privacy Act, an investigatory file may be deemed to be "about" the individual who was the target of an agency's investigation as well as the author of the file.

This conclusion is supported by *Topuridze v. United States Information Agency*, which specifically recognized that a document can be both "about" its author and the person who is the subject of the document and therefore be accessible to each under the Privacy Act. 772 F.Supp. 662, 665 (D.D.C.1991). To hold otherwise, the court noted in *Topuridze*, "could lead to results contrary to the purposes of the Privacy Act" because "[o]nly the government would have access to a record pertaining to more than one individual." *Id.* at 666.

Even though Williams was the author of the time-records at issue in this case, the Petitioners were the subject of those records because they were the target of her investigation. Therefore, Petitioners have a sufficient connection to the records to demand their release under the Privacy Act and it is respectfully requested that certiorari be granted to make this point clear.

CONCLUSION

The current Presidential Administration recently reaffirmed the importance of the FOIA as "the most prominent expression of a profound national commitment to ensuring an open Government." Memorandum of January 21, 2009 - Freedom of Information Act, Presidential Documents, 74 Federal Register 15 (26 January 2009), p. 4683. As such, this petition is especially timely and Petitioners respectfully request that certiorari be granted.

Respectfully
submitted,
DENNIS CALO
Counsel of Record

FRANK AGOSTINO
JAMES J. BONICOS
Calo Agostino, P.C.
The Bank House
14 Washington Place
Hackensack, NJ 07601
(201) 488-5400
Attorneys for
Petitioners